Supreme Court, U. S.
FILED
MAR 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1497

DONALD M. HEAVRIN - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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SUPREME COURT OF THE UNITED STATES

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No._____

DONALD M. HEAVRIN - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The petitioner, Donald M. Heavrin, respectfully prays that a writ of certiorari issue to review the decision in this case on January 3, 1979, by the Supreme Court of Kentucky. (Mandate, Appendix, p. 37-39).

OPINIONS AND ORDERS BELOW

The Supreme Court of Kentucky ordered the petitioner, Donald M. Heavrin, suspended from the practice of law for a period of two years. The original opinion of the Supreme Court of Kentucky was rendered October 31, 1978, and is found on pages 1-25 of the Appendix.[1] The Court will note that the opinion is not unanimous and that the Chief Justice joined in by one other Justice vigorously dissented. The peti-

[1] *Kentucky Bar Association* v. *Heavrin*, Ky., 573 S. W. 2d 916.

tioner, Donald M. Heavrin, timely petitioned the Supreme Court of Kentucky for a rehearing, and this petition was denied on January 3, 1979. (Appendix, pp. 37-38). An order staying the execution of the mandate was entered by the Supreme Court of Kentucky on January 8, 1979. (Appendix, p. 26).

The decision of the Supreme Court of Kentucky resulted from certain findings of the Board of Governors of the Kentucky Bar Association and these Findings are contained in the opinion of the Supreme Court of Kentucky, pages 2 through 9. The Trial Committee of the Kentucky Bar Association, which originally heard the charges against the petitioner, Donald M. Heavrin, rendered two opinions. The first opinion by a vote of 2 to 1 recommended that all charges against the petitioner be dismissed because the respondent, Kentucky Bar Association, had not complied with its own rules and, accordingly, the petitioner was denied due process. This opinion and dissent is found on page 31 of the Appendix.

The second opinion of the Trial Committee unanimously recommended that all charges against the petitioner be dismissed and this opinion is found on page 34 of the Appendix.

A companion civil case was involved in these proceedings. This case was styled *Citizens Fidelity Bank and Trust Company* v. *Donald M. Heavrin, et al.*, Jefferson Circuit Court, Chancery Branch, Second Division, #174698, Hon. James Hubbs presiding. Judge Hubbs rendered an opinion in this case exonerating the petitioner from any wrong doing. Judge Hubb's Findings of Fact and Conclusions of Law are found on page 38 of the Appendix.

The Appendix also includes certain excerpts from briefs filed by the respondent, Kentucky Bar Association, before the Supreme Court of Kentucky and certain excerpts from a pre-trial discussion held on March 10, 1977, before the Trial Committee.

JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on January 3, 1979. This Petition for Writ of Certiorari was filed within 90 days of January 3, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT OF QUESTIONS PRESENTED

I. Did the respondent, Kentucky Bar Association, and the Supreme Court of Kentucky deny the petitioner, Donald M. Heavrin, due process of law and equal protection of the law when it did not provide the petitioner, Donald M. Heavrin, with copies of the original complaints as required by the Rules of the Supreme Court of Kentucky relating to bar disciplinary procedures?

II. Did respondent, the Kentucky Bar Association, and the Supreme Court of Kentucky deny the petitioner, Donald M. Heavrin, due process of law and equal protection of the law when vague charges, without citation of specific disciplinary rules, were made against the petitioner, Donald M. Heavrin, and in reversing

findings of fact made by the lawfully appointed Trial Committee and by a State Circuit Judge without stating any reason for doing so?

PROVISION OF CONSTITUTION INVOLVED

The Constitution provision relative to the issues in this case is Amendment XIV, Section 1, United States Constitution:

> "Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

TIME AND PLACE WHEN QUESTIONS WERE FIRST RAISED BELOW

Question #1 relative to not having a copy of the actual complaints was raised in response to the correspondence from the KBA and before the Trial Committee of the Bar Association. (Appendix, pp. 49-50). Question #2 was raised at the beginning, as noted by Chief Justice Palmore (Appendix, p. 21), ". . . it makes me think that perhaps Heavrin had been right all along in insisting that from the beginning the charges were never sufficient." See also Appendix, pp. 23 and 24, dissent of Chief Justice Palmore. It was also raised in the answer to the formal charges (Appendix, p. 64).

STATEMENT OF THE CASE

At all times material, the petitioner, Donald M. Heavrin, hereafter referred to as Heavrin, was a duly licensed and regularly practicing attorney within the Commonwealth of Kentucky and a member of the bar of this Court.

He was charged with seven counts of unethical conduct by the respondent, Kentucky Bar Association, hereafter referred to as KBA.

At the time this controversy arose and now, Kentucky had an integrated Bar act. All and final authority was vested in the Supreme Court of Kentucky. So that this Court will not be confused, the Commonwealth of Kentucky, by constitutional amendment, changed its court structure during the pendency of these proceedings. Formerly, the Court of Appeals of Kentucky was the highest court whereas now it is the Supreme Court of Kentucky, and the Court of Appeals of Kentucky is an intermediate court between the Circuit Court and the Supreme Court. The Circuit Court is the trial court and is one of general jurisdiction. The Supreme Court of Kentucky will hereafter be referred to as S. Ct. of Ky.

The S. Ct. of Ky. has established the method and procedure for processing charges of unethical conduct against lawyers.

According to Rule 3.160(a) (hereafter SCR) of the Supreme Court of Kentucky (Appendix, p. 30), a disciplinary action is commenced when an aggrieved party files a complaint with the Executive Director of the Bar

Association. Upon receipt of the complaint the Executive Director is required to notify the attorney, who is in turn given fifteen days to either respond to the complaint or acknowledge receipt of the complaint.

When the attorney responds, his answer along with the complaint is forwarded to a body known as the Inquiry Tribunal.

The Inquiry Tribunal either dismisses the complaint or files charges against the attorney.

If the Inquiry Tribunal files charges the case is referred to a Trial Committee who hears evidence and files its findings with the Board of Governors of the Kentucky Bar Association. The Board of Governors without hearing any witnesses or receiving any evidence then votes at its monthly meeting on the innocence or guilt of the accused, and recommends punishment, if any.

If the accused is dissatisfied with the findings and the recommendations of the Board of Governors, he may petition the Supreme Court of the state for review.

Now, let us examine the facts of this case in light of the Kentucky Disciplinary Rules.

The true center of controversy in this case is James F. Donoghoe, a former client of Heavrin's. At the time Donoghoe employed Heavrin, he was a licensed practicing attorney in the state. He has subsequently been disbarred and sentenced to the penitentiary for forging his client's names to settlement checks. *Kentucky State Bar Association* v. *Donoghoe,* Ky., 486 S. W. 2d 703; *Kentucky Bar Association* v. *Donoghoe,* Ky., 497 S. W. 2d 937. However, in 1972 when Heavrin

was representing Donoghoe, none of this information had come to light.

At the outset, Donoghoe hired Heavrin to represent him in a case that was before the Jefferson Quarterly Court where a client of Donoghoe's had taken a warrant against him for writing a worthless check in the amount of Three Thousand Dollars. Heavrin had not previously known Donoghoe and took the case because Mr. Frank Haddad, a member of the Board of Governors, and later the President of the KBA, referred the case to him. In the case before the Jefferson Quarterly Court, Donoghoe had entered into an agreement with his clients wherein they loaned Donoghoe a portion of the proceeds of an accident settlement. Donoghoe in turn agreed to pay his clients nine percent on the money with the understanding that he would pay them the balance on demand or make installment payments when his clients needed additional money. His clients who lived in Pennsylvania requested a Three Thousand Dollar payment and when Donoghoe's check was returned marked "drawn on uncollected funds" the Pennsylvania clients, believing they had been hoodwinked obtained a warrant for his arrest.

There was a controversy about the terms and conditions of the agreement between Donoghoe and his Pennsylvania clients, but Heavrin advised Donoghoe he was not interested in contesting or enforcing the agreement, and stated he would not represent him unless he paid the people in Pennsylvania in full, (Appendix, p. 68).

When the case of uttering a worthless instrument was called in the Jefferson Quarterly Court, Donoghoe

paid his Pennsylvania clients Three Thousand Dollars in cash to cover the check that was the gravamen of the criminal prosecution, however, the clients demanded payment of all monies they had loaned Donoghoe. The Quarterly Court case was continued various times so Donoghoe could raise the money to pay his clients in full. Ultimately, the charges were dismissed because Donoghoe made restitution.

However, at the time the clients demanded full payment Donoghoe did not have any cash, but he had substantial assets and in order to raise the money necessary to satisfy most of this claim he sold Heavrin his personal jewelry valued at approximately One Hundred Thousand Dollars, with the provision he could repurchase the jewelry within thirty days. Donoghoe had several important cases pending that would generate enough money to enable him to repurchase his jewelry from Heavrin, and it was only a matter of time until Donoghoe would be in the black and have enough money to satisfy all of his creditor's claims (Appendix, p. 16).

Several weeks after Heavrin purchased the jewelry from Donoghoe, Donoghoe unexpectedly found Heavrin at the courthouse and gave him a check for Forty Nine Thousand Dollars drawn on his personal account to cover Heavrin's fee and to repurchase the jewelry (Appendix, p. 17).

On the way back to the office, Heavrin went to the bank and deposited the check. Shortly thereafter, Donoghoe came to his office and told Heavrin that his wife had written checks on his personal account to pay other creditors and he asked Heavrin to give him his

check back. When Heavrin advised Donoghoe he had already deposited the check, Donoghoe become very excited because this would cause the checks his wife had written to bounce.

Because Donoghoe had other money coming in within a few days, Heavrin not wanting to cause Donoghoe any further embarrassment, wrote a check to set aside Donoghoe's original check. Both of these checks were ultimately returned because they were "drawn on uncollected funds." Without explanation, the Kentucky Bar Association held this transaction caused the bench and bar to be held in disrepute.

A day or two later, Donoghoe received a check in the amount of One Hundred and Five ($105,000.00), which represented a partial settlement of a case where he was the executor of an estate, and the attorney for other individuals who had been injured in an automobile accident. Upon reecipt of this check, Donoghoe contacted Heavrin and had him meet him at the bank so Donoghoe could cash the check and repay Heavrin. The uncontroverted proof was that at the time this transaction occurred Heavrin believed that Donoghoe was entitled to fifty percent of the amount recovered or Fifty Two Thousand, Five Hundred Dollars ($52,500) as his attorney's fee in the case (Appendix, p. 70).

When Heavrin and Donoghoe arrived at the bank, Donoghoe's bank refused to cash the check telling him that it could not be honored because it was "drawn on uncollected funds."

Heavrin then took the check to his bank, cashed it and got Eleven Thousand Dollars ($11,000) which he

gave to Donoghoe, so that Donoghoe could provide his clients with the immediate cash they needed (Appendix, p. 17).

Heavrin also wrote Donoghoe a check for the money he and the other payees had coming so Donoghoe could pay his clients the balance of the money he owed them.

The rest of the money which constituted Donoghoe's fee was given to Heavrin by Donoghoe to repurchase the jewelry, to enable Heavrin to forward the balance owed by Donoghoe to his Pennsylvania clients, and to pay off other general creditors of Donoghoe's who were pressing for payment. Because Heavrin maintained his escrow account at the Bank of Louisville which was several blocks away, with Donoghoe's consent he temporarily deposited these funds in his personal account so that he would not have to walk across town with $40,000.00 cash in his pocket. Heavrin's client (Donoghoe) was present during these entire proceedings and authorized Heavrin to take every step that was taken. Upon Heavrin's arrival back at his office he wrote a check on his personal account so the money could be transferred to escrow. From these facts, the KBA held that Heavrin had unethically commingled Donoghoe's funds with his own.

The KBA also held that Heavrin made a misrepresentation to Mrs. Collie, an officer at his bank, about the authenticity of the endorsements. This conclusion will be discussed in greater detail.

Although the check that Heavrin cashed was fully endorsed, certified and completely negotiable under the Uniform Commercial Code as adopted by the State of

Kentucky, the KBA found that Heavrin was guilty of not protecting the other payees of the check because he cashed the check and delivered the proceeds to Donoghoe. Without citing any canon, case or precedent the KBA concluded that this held the Bench and Bar in disrepute.

The transactions concerning the cashing of this check occurred on Friday. Although no one in the banking community bothered to tell Heavrin about the situation, serious questions have been raised about the authenticity of the endorsements on this day. Finally, on Monday, Heavrin's bank refused to honor any checks drawn on the Ninety Four Thousand Dollars ($94,000) that remained in Heavrin's account, and the executive vice-president of Citizens Fidelity Bank, Dan Ulmer, called Heavrin and told him for the first time there was a question about the validity of the endorsements. Heavrin responded by calling Donoghoe and demanding an explanation (Appendix, p. 69). Donoghoe assured him that the endorsements were valid. Heavrin called the bank back and gave the vice-president the names, addresses and phone numbers of all payees he could remember, so the bank could make an independent investigation for itself. This fact weighed heavily in the Circuit Court's decision concerning who caused the loss (Judge Hubb's opinion, Appendix, pp. 38-39).

Later in the day, the vice-president of the bank called Heavrin back and told him that he had personally checked the endorsements, everything was okay and checks drawn against the money would be honored (Appendix, pp. 38-39).

Nine months later the bank discovered the endorsements had been forged by Donoghoe and sued Heavrin and the other payees of the check in a declaratory judgment action. The other payees whose endorsements were forged by Donoghoe did not crossclaim or file suit against Heavrin.

After a full-blown trial which lasted several days, the Circuit Court held that Heavrin had nothing to do with the forgeries and the loss was caused by the bank's own negligence (Appendix, 38-39).

While the declaratory judgment action was pending the director of the Kentucky Bar Association sent Heavrin a letter dated August 15, 1973 (Appendix, p. 41), stating a complaint had been filed against him, but there was no complaint in the envelope with the director's letter. Pursuant to SCR 3.180, a disciplinary proceeding can be deferred if the same issues are before a court of competent jurisdiction. In the instant case, the KBA action was held in abeyance. The Circuit Court rendered its opinion and Heavrin through his attorney sent a cover letter to the KBA along with a copy of the opinion (Appendix, p. 62).

At this point, it should be observed that the SCR 3.170 provides that the Director *shall* forward the complaint and answer to the Inquiry Tribunal and the Tribunal can either dismiss the complaint or file charges. There are no provisions in the rules for additional investigation or expansion of the charges.

Apparently, neither of these steps were taken because Heavrin never heard anything from the Inqury Tribunal. However, nine months later the Director of

the Bar Association in June, 1976, sent Heavrin another letter in which he repeated the allegations contained in the first letter, and made several new allegations (Appendix, p. 64). Again, he did not enclose a copy of any complaint that had been filed.

On June 21, 1976, Heavrin answered the letter, protested the missing complaint, and alleged that there were no objective standards in determining either guilt or punishment in a Bar Disciplinary proceeding (Appendix, p. 64). This time, the Inquiry Tribunal charged Heavrin and a Trial Committee was appointed. The Trial Committee after receiving briefs and hearing arguments of counsel held two to one that the Kentucky Bar Association did not follow its own rules and had denied Heavrin due process by not furnishing him a copy of the complaint (Appendix, pp. 31-33).

After the Trial Committee recommended the charges be dismissed because of the denial of due process, the Board of Governors remanded the case to the Trial Committee for recommendation on the merits and the Trial Committee found the petitioner not guilty by a vote of three to nothing on all charges (Appendix, pp. 34-36).

Thereafter the Board of Governors at its monthly meeting voted Heavrin guilty on four of the seven charges that were filed against him.

Heavrin petitioned the Supreme Court of Kentucky for review, and the majority of the court affirmed the findings of the Board of Governors with two Justices dissenting.

REASONS FOR GRANTING THE WRIT

I. Failure of Due Process

At the outset the KBA sent Heavrin a letter dated August 15, 1973 (Appendix, pp. 41-43), and the letter said, "Please accept this letter as a notice of a complaint filed against you pursuant to the provisions of RCA 3.160.[2] In accordance with this rule, you are given 15 days from the date of this letter to respond to the complaint."

Heavrin protested the fact that no complaint had been sent to him and when this case was before the Trial Committee. Mr. Damron, who was then representing the Bar Association, told the Trial Committee that they had received a letter from a reliable citizen, but they admitted that Heavrin had not been sent a copy of the letter. When this case reached the Supreme Court level, the Bar Association said for the first time that there were three sworn affidavits in addition to the letter that formed the basis of the complaint, and the KBA stated in its brief, "It has been the unwaivering position of the complainants that Respondent has absolutely no right whatsoever to see a copy of the actual complaint . . . " (Appendix, pp. 51-54).

It is petitioner's contention that the writ of certiorari should be granted because he has been denied due process of law and equal protection of the law.

Disbarment proceedings are quasi-criminal in nature. *In Re: Ruffalo,* 390 U. S. 544, 20 L. Ed. 2d 117,

[2]RCA means Rules of the Court of Appeals before the change in the Kentucky judicial structure.

88 S. Ct. 1222. While states have the power to control the practice of law, the power cannot be exercised so as to abrogate federally imposed rights. *Johnson* v. *Avery,* 393 U. S. 483, 21 L. Ed. 2d 718, 89 S. Ct. 747. A state may not act arbitrarily or otherwise violate a lawyer's constitutional right. *Spevack* v. *Klein,* 385 U. S. 511, 17 L. Ed. 2d 574, 87 S. Ct. 625.

A lawyer in a proceeding which will determine the lawyer's right to practice his profession is entitled to due process of law and a state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process or equal protection clause of the Fourteenth Amendment. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 1 L. Ed. 2d 796, 77 St. Ct. 752. *Konigsberg* v. *State Bar of California,* 353 U. S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722.

Procedural due process requires confrontation and cross-examining of those whose word deprives a person of his livelihood. *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96, 10 L. Ed. 2d 224, 83 S. Ct. 1175. In *Willner,* it was held that the petitioner was denied procedural due process when he was denied admission to the bar by the appellate division without a hearing on the charges filed against him before either the committee or the appellate division.

Other applicable language in *Willner* is:

> "But a 'full hearing'—a fair and open hearing—requires more than that . . . Those who are brought into contest with . . . Government in a quasi-judicial proceeding aimed at the control of

> their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Willner also says that procedural due process often requires confrontation and cross-examining of those whose words deprive a person of its livelihood. Remember, the petitioner, Heavrin, was not heard in person before the Board of Governors or by the S. Ct. of Ky. The S. Ct. of Ky. has reserved into itself all fact finding powers in a bar disciplinary case but it does seem reasonable and fair and required by elementary constitutional law that where a fact finding body disturbs the facts found by another it should give some basis for doing so. This did not occur in the case here.

More disturbing is the fact that the Board of Governors of the KBA and the S. Ct. of Ky. refused to deal with or decide this basic constitutional question, although, it was clearly and forcefully made to the S. Ct. of Ky. by the petitioner, Heavrin. On page 47 of the Appendix, a portion of the KBA's brief before the S. Ct. of Ky. is set forth. KBA acknowledged that petitioner, Heavrin, raised two questions on procedural defects before the Court yet the Court in its majority opinion did not even discuss them. These questions were timely raised before the Trial Committee, argued and briefed before the Trial Committee, and there is no contention that these questions were not timely asserted and vigorously advanced by the petitioner, Heavrin.

Thus, right of due process here was violated because (a) the petitioner, Heavrin, was not given a copy of the actual complaint filed against him, and (b) the KBA's own rule required this to be done.

It may be argued the KBA's letter described the charges, but it is not sufficient because exculpatory material may have been contained in the letter the respondent, KBA, referred to in the hearing before the Trial Committee (Appendix, p. 49), and the same is true of the affidavits referred to in its brief before the S. Ct. of Ky. (Appendix, p. 51). It occurs that if a warrant based upon an affidavit issued to a defendant in a criminal matter and the proceeding lated resulted in an indictment before a grand jury the defendant would be entitled to a copy of the affidavit which caused the original issuance of the warrant leading to his arrest and later indictment. Suppose the chief prosecuting witness testified to something different at the trial than was contained in the affidavit in support of the warrant.

Suppose a judge says to a defendant, "You have been indicted for first degree murder," and the defendant demands to see the indictment and the request is refused. It would hardly suffice if the judge replied that the defendant had notice of the indictment and the charges and all he really needed to know was the name of the charge. We cannot imagine such a set of circumstances ever existing in a democratic society but it is exactly what occurred here.

One of the charges involved a very critical issue of fact and related to whether or not the petitioner, Heavrin, had made certain representations to an officer

of the Citizens Fidelity Bank. (See dissent of Chief Justice Palmore, Appendix, p. 13).

The Trial Court in the civil case had found that petitioner, Heavrin, had nothing to do with the forgeries or any conspiracy and the Trial Committee of the KBA acquitted Heavrin of these charges. The Bank officer testified in the civil trial and her testimony was considered by the Trial Committee. Apparently, the Trial Court nor the Trial Committee believed the bank officer because if either had then it could not have vindicated or acquitted the petitioner. Accordingly, if the bank officer was one of the affiants or the person who wrote the letter or signed the original complaint with the respondent, KBA, then anything such person may have said in the complaint, whether it was by letter or affidavits, would be vital on this precise issue. The failure to do this particularly when it is required by the respondent's own rule clearly denies petitioner, Heavrin, due process of the law. This whole proceeding is analogous to the situation where a lawyer is held before his licensing authority and told that unsubstantiated allegations about him have been brought to the attention of the authority and would he please explain all of his activities and vindicate his conduct.

We think *In Re: Ruffalo,* 390 U. S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222 is applicable and controlling in this case and compels a conclusion that petitioner is entitled to the relief he seeks. In fact, it probably requires a summary reversal or vacating of the judgment of the S. Ct. of Ky.

Ruffalo was generally accused of soliciting FELA cases. After the proceedings had started, the charges were amended to include a charge that Ruffalo's investigator had investigated his own employer. The investigator was employed by the railroad. This charge was added after the proceeding commenced and Ruffalo was found guilty of the charge and suspended from practice in the Federal Courts of Ohio. The following language in Ruffalo is relative and in our judgment controlling:

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. Ex parte Garland, 4 Wall 333, 380, 18 L. Ed. 366, 369; Spevack v. Klein, 385 U. S. 511, 515, 17 L. Ed. 2d 574, 577, 87 S. Ct. 625. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See In re Oliver, 333 U. S. 257, 273, 92 L. Ed. 682, 68 S. Ct. 499. It was said in Randall v. Brigham, 7 Wall 523, 540, 19 L. Ed. 285, 293, that when proceedings for disbarment are 'not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense.' Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether 'the state procedure from want of notice or opportunity to be heard was wanting in due process.' Selling v. Radford, 243 U. S. 46, 51, 61 L. Ed. 585, 587, 37 S. Ct. 377.
>
> In the present case petitioner had no notice that his employment of Orlando would be considered a

disbarment offense until after both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.'

These are adversary proceedings of a quasi-criminal nature. Cf. In re Gault, 387 U. S. 1, 33, 18 L. Ed. 2d 527, 549, 87 S. Ct. 1428. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh. How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."

Petitioner understands that *Ruffalo* relates to the right of a disbarred lawyer to continue practicing in the Federal Courts.

In *Getty* v. *Reed,* 547 F. 2d 971, CA 6 Ky. 1977, the Sixth Circuit discussed disciplinary procedures for Kentucky lawyers. Although the opinion primarily relates to the question of when a Federal Court would entertain an action by a lawyer who had been disbarred by a State Court, it did use some very relevant and pertinent language.

"If, for example, the rules adopted by the Kentucky Court of Appeals had been such as to permit *filing of secret complaints* against lawyers and in camera hearings and disbarment as a result of said complaints without written statement of charges or opportunity for a public hearing and confrontation of witnesses and our current complainants had been disbarred in such a proceeding with final affirmation of that decision by the state's highest court, would there be doubt that under the Fourteenth Amendment and the supremacy clause the three-judge court would have 'jurisdiction?' We think not." (Emphasis added)

II. There Must Be Some Objective Standard Before the Mandate of Due Process-Equal Protection is Satisfied.

In answering the charges brought forth by the Inquiry Tribunal, Heavrin stated, "He is denied equal protection of the law because there are no objective standards in determinig guilt or punishment." Appendix, p. 64).

The majority of the court ignored this issue, but the dissenting justices dealt with this issue, and stated, "If the canons of ethics adopted for the legal profession were tested under the 'void for vagueness' doctrine which has spelled the doom of various breach of peace and disorderly conduct laws throughout the country, it is doubtful they would survive this case" (Appendix, pp. 23-34).

No other profession in the State of Kentucky is treated with such disdain. For example, in *Osborne* v. *Bullitt County Board of Education,* Ky., 415 S. W. 2d

607, the Kentucky Appellate Court held the charges against a teacher must be dismissed because they were insufficient. In *Armstrong* v. *Board of Civil Service Commission,* Ky., 48 S. W. 2d 1065, the Appellate Court said that it would zealously guard the rights of public employees to require charges for demotion or discharge to be very definite and certain. In *Hartman* v. *Board of Education of Jefferson County,* Ky., App., 562 S. W. 2d 674, the present Court of Appeals condemned the notice of demotion because it lacked specificity.

In *Konigsberg* v. *State Bar of California,* 353 U. S. 252, this Court struck down the vague qualification of "good moral character" as a prerequisite for admission to the bar. The petitioner submits the standard of "holding the bench and bar is disrepute" is equally vague and is, therefore, unconstitutional.

III. Before An Attorney's License Can Be Suspended He Must Be Guilty of Some Wrong Doing.

The Supreme Court in its majority opinion refers intermittently to all seven charges, even though Heavrin was acquitted by the Board of Governors on the first three. A careful reading of the opinion establishes that Heavrin was convicted of: (1) making a misrepresentation to Mrs. Collie at the bank, (2) commingling funds, (3) not protecting payees, and (4) exchanging checks.

(1) Misrepresentation to Mrs. Collie:

The Jefferson Circuit Court heard Heavrin and Mrs. Collie testify at great lengths and believed Heavrin, otherwise, it would have been impossible for the Circuit Court to have found in Heavrin's favor (Appendix, pp. 38-39).

A Trial Committee held two hearings, questioned Heavrin in detail and held, "There was no evidence of any unethical conduct in the cashing of the check" (Appendix, p. 14).

The Board of Governors, at its monthly meeting, then voted (in effect) that the Jefferson Circuit Court and the Trial Committee who heard the witnesses were incorrect in their assessment of the evidence, but neither the Board of Governors or the Kentucky Supreme Court explained how they reached this conclusion. In any other type of litigation, the findings of fact and conclusions of law by a fact finding body cannot be set aside unless the findings are clearly erroneous. This is Hornbook law.

Why would the majority of the Court automatically believe the bank is telling the truth and the lawyer is not? Do lawyers always lie and bankers always tell the truth? Moreover, this conclusion by the Board of Governors and the Supreme Court of Kentucky is inconsistent with the evidence.

The Board of Governors stated in its opinion:

> "Once having entered into this course of conduct the Respondent then devoted most of his energy to the protection of his own financial interests and not to the protection of the parties rightfully entitled to the funds (Appendix, p. 9).

If this be true, what interest was Heavrin protecting? Presumably, he was trying to persuade the bank

to cash the check so Donoghoe would have the money necessary to repurchase his jewelry. But if this was his motive, it was certainly inconsistent with his actions. When the bank was still holding $94,000.00 of the money, Dan Ulmer, the Executive Vice-President, called Heavrin and asked him about the endorsements. Heavrin told Ulmer about Donoghoe renting a plane to fly to Whitesburg to obtain the signatures of the other payees, and about seeing him off to Florida to obtain the endorsements of the Florida lawyer who was co-counsel on the case (Appendix, p. 16). Heavrin also called Donoghoe (Appendix, p. 68) and demanded an explanation, and called the bank back and gave the bank the names, addresses and phone numbers of all payees he knew about (Appendix, pp. 38-39).

Thus, the Board of Governors, and the Supreme Court of Kentucky have ignored the evidence and have set aside without reason or comment the conclusions of two competent fact finding bodies.

(2) Commingling Funds:

The majority's opinion on this issue disregards the fact that an attorney can commingle funds if his client gives him permission to do so. In the instant case, Donoghoe, who was Heavrin's client, was present at all times when the alleged commingling occurred, authorized every step that was taken, kept records of the transactions, was completely satisfied with Heavrin's representations, and never filed any complaints about the matter with the Bar Association.

In contrast to the instant case, and to further illustrate the lack of any objective standard, the petitioner cites *Ky. Bar Association* v. *Burroughs,* decided February 6, 1979, 26 KLS 2 (Appendix, p. 58), wherein Burroughs deposited his client's money in his attorney's account, and then lent the money without his clients knowledge to a third party to buy a truck. For this act and others Burroughs received a public reprimand.

In this case, Mr. Chief Justice Palmore's dissent dissects this issue with such force petitioner believes no further argument is needed.

(3) Failure to Protect Payees:

This allegation can best be characterized as unique. Donoghoe brought Heavrin a fully endorsed, certified check and asked him to cash the check. Presumably the Bar is complaining because Heavrin did not take the pro rata share that was due to each of the payees named in the check and delivered the money to them personally. This check was fully negotiable under the Uniform Commercial Code, and cashing it could not under any circumstances be violative of any code of ethics.

Following the Board of Governors thinking to its illogical conclusion, no two-party check could ever be cashed unless all parties were present to receive their pro rata share of the money. Otherwise, no person at the bank would risk cashing such a check because they would be held responsible if one payee absconded with all the money. Heavrin made every effort to see that everything was in order (Appendix, pp. 38-39).

(4) Exchange of Checks:

This transaction was totally harmless, no one was defrauded, no one lost a thing and neither the Board of

Governors nor the Supreme Court of the State is able to explain how this transaction violated any code of ethics. The dissenting opinion refers to the problems Alice had with the ruthless Queen of Hearts and accurately stated, " . . . the Board evidently convicted Heavrin first and then decided what it convicted him for. This may comport with due process but it makes me think that perhaps Heavrin had been right all along in insisting that from the beginning the charges were never sufficient" (Appendix, p. 21)

The petitioner believes the analogy to the Queen is correct and submits it is impossible to defend any type of case either factually or legally when the Queen is shouting, "First the verdict then the evidence."

In *Thompson* v. *City of Louisville,* 362 U. S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624, a unanimous court accurately noted, "Just as 'conviction upon a charge not made' would be sheer denial of due process, so is it a violation of due process to convict and punish a man without evidence of his guilt."

In the present case, Heavrin plain and simple did nothing wrong, violated no canon of legal ethics, and is being arbitrarily punished. We would respectfully submit the mandate of *Thompson* is applicable to the case at bar.

CONCLUSION

If you read only the majority opinion, it would be impossible to determine what happened in this case, yet the Board of Governors' opinion is permeated with ominous sounding accusations and menacing descriptions. Every action and statement made by Heavrin has been construed as evidence of his guilt.

For example, the Board of Governors talks of Heavrin of being suspicious of Donoghoe and then proceeding without caution. In reality, Heavrin testified, "Well, I said in the deposition that, any time I have ever represented anyone in a criminal case, you always have some suspicions, and I have been suspicious of people that told me the absolute truth and I felt very confident about people who were lying to me. I had no more suspicion about him than I would someone who walked in this afternoon and told me their version of a criminal case . . ." (Appendix, p. 68).

We wonder how the Board of Governors would have construed the case if Heavrin said he was never suspicious of any of his clients and always accepted their word without doubt.

Thus, we have an attorney convicted of violating the canons of ethics when:

(1) The Bar Association commenced a disciplinary action against one of its member, and has had the audacity to argue that it does not have to show a copy of the complaint to the accused.

(2) The Board of Governors and the Supreme Court of the State have ignored the findings of two fact

finding bodies who exonerated the petitioner, without stating any reason for doing so.

(3) The Board of Governors and the Supreme Court have ignored all arguments relating to due process and equal protection, and have made no findings on either of these issues despite the fact they were exhaustively briefed. A motion for oral argument was made but it was denied.

(4) The conduct of the petitioner in this case was not unethical and neither the Board of Governors nor the Supreme Court have been able to cite any authority to support its conclusions.

In the history of Kentucky jurisprudence there has never been a dissenting opinion on the issue of guilt in a disciplinary case, and we sincerely hope this Court examines both the majority opinion and the dissenting opinion.

The April 10, 1978, edition of Time quoted the late Mr. Justice Tom Clark as saying disciplinary proceedings are "scandalous" because only small-time lawyers, without connections, are ever disciplined.

The case before this Court deals with an attorney who has diligently represented his clients for twelve years without regard to the popularity of the cause (e.g. *Pankey* v. *Commonwealth,* Ky., 485 S. W. 2d 513 and *Laing* v. *United States,* 423 U. S. 161, 46 L. Ed. 2d 416, 96 S. Ct. 473).

If Heavrin had researched the law every step of the way, he could not have found a single case from any jurisdiction condemning his conduct. Therefore, for the reasons stated herein, this Court should summarily

overturn the ruling of the Kentucky Supreme Court or alternatively grant certiorari so this case can be fully argued on the merits.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 1979, three copies of this Petition for Writ of Certiorari and accompanying separate Appendix were mailed, postage prepaid to Hon. Leslie Whitmer, Director, and Mr. Michael Hooper, Kentucky Bar Association, 403 Wapping Street, Frankfort, Kentucky.

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Counsel for Petitioner

Supreme Court, U. S.
FILED
MAR 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1497

DONALD M. HEAVRIN - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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Rendered: October 31, 1978

SUPREME COURT OF KENTUCKY

78-SC-278-KB

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

PER CURIAM

In this disciplinary proceeding the Kentucky Bar Association charged Donald M. Heavrin, a Louisville attorney and a member of the Kentucky Bar Association, with seven counts of unethical conduct calculated to bring the bench and bar of Kentucky into disrepute. A trial committee consisting of three members filed an opinion with one member of the committee filing a dissenting opinion recommending that the Board of Governors dismiss the charges because Heavrin alleged the Kentucky Bar Association had not proceeded properly under the provisions of former RAP 3.160.[1] On July 16, 1977, the Board of Governors sent the case back to the trial committee to make recommendations on the merits. Then on January 2, 1978, the trial committee recommended dismissal of all charges by unanimous vote. Subsequently on March 18, 1978, the Board of Governors, after full consideration, voted on the issue of guilt or innocence. Ten members of the Board found Heavrin guilty on Counts IV through VII and recommended that he be suspended

1 *"The Initiation of Disciplinary Cases*

(a) Any complaint against an attorney for unprofessional conduct shall be filed with the director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has 15 days to acknowledge receipt of the complaint or respond to the merits." Amended Oct. 14, 1977, effective Jan. 1, 1978. (No substantial change in this section.)

from the practice of law in this Commonwealth for a period of two years. It was further recommended by the Board of Governors that Heavrin pay the costs of these proceedings. One member found him not guilty. Thereafter Heavrin filed in this court a notice for review and brief.

This court has reviewed the record including the proceedings of the Jefferson Circuit Court entitled "Citizens Fidelity Bank and Trust Co. v. Donald M. Heavrin," No. 176498, which by stipulation the parties made a part of this record all of the testimony and proceedings of the Jefferson Circuit Court.[2]

In order to place the issues in proper perspective, this court is of the view that the findings of fact and conclusions by the Board of Governors very aptly cuts through the voluminous and prolix testimony presented before the trial committee including the evidence presented in Civil Action No. 176498 styled "Citizens Fidelity Bank and Trust Co. v. Donald M. Heavrin."[3] The finding of facts and conclusions of the Board of Governors are as follows:

FACTS

"The facts of the case are drawn from the proceedings of the Jefferson Circuit Court, entitled 'Citizens Fidelity Bank and Trust Company v. Donald M. Heavrin, No. 176498'. By stipulation, the parties made a part of this record all of the testimony and proceedings of the Jefferson Circuit Court.

Sometime in March, 1972, Heavrin was employed and undertook to represent James D. Donoghoe, a former member of the association, on a charge of uttering a worthless check in the amount of $3,000.00. It appears that Donoghoe had some bizarre arrangement with certain clients in Pennsylvania to use $42,500.00 of a settlement he had made for them in a personal injury case. Donoghoe was to use the $42,500.00 in a real estate deal upon the payment of 9% interest to the client, subject to the right of the client to call upon Donoghoe from time to time for payment. The $3,000.00 which gave rise to the prosecution represented a check by Donoghoe to these clients which bounced. A Warrant was issued for Donoghoe's arrest and an arrangement was made with the County Attorney's office, whereby Donoghoe paid the $3,000.00 bad check and the case was continued by the County Attorney's office until payment in full was made to the client.

Sometime during the course of his representation of Donoghoe Respondent learned that Donoghoe was being threatened with further criminal prosecution and disciplinary action before the Bar Association if the full amount of the unpaid balance was not immediately paid. The Respondent testifies that he informed Donoghoe that he must make restitution to these clients before the charges would be dismissed. The Respondent on one occasion engaged in a heated telephone conversation with one of the Pennsylvania clients in which the Respondent was informed that prosecution would ensue unless the money was paid.

The Respondent testifies that he felt Donoghoe was being taken advantage of, therefore, he made arrangements to loan Donoghoe the money and the criminal prosecution subsequently abated.

The Respondent admits he did not have the money to loan, however, he undertook to raise the money and this is where the problems began to arise in this case.

[2]One volume consisting of the original record, eight volumes of depositions, and three volumes of evidence.

[3]The trial court absolved Heavrin of liability except for $11,000.00 he received when the $105,000.00 check was presented to Citizens for deposit. This was before Maureen Collie, who authorized the transaction, knew anything concerning the questionable endorsements.

The Respondent had previously represented one Norman Bodenbender and borrowed money from him personally on other occasions.

It appears that Mr. Bodenbender was a person of some means but secreted the full extent of his assets. The Respondent called Bodenbender and asked for the loan and Bodenbender questioned the purpose of the loan. At this point the Respondent felt his duty to his client (Donoghoe) prevented him from disclosing the purpose was really to bail out a recalcitrant lawyer so he told Bodenbender it was for a real estate deal.[4] The conversation culminated in a loan to the Respondent by Bodenbender in the amount of $32,500.00 some two days later.

During the conversation and prior to his getting the money from Bodenbender, the Respondent admits that he was becoming suspicious of Donoghoe's actions[5] but in spite of his suspicions, he still felt he could help him out of these difficulties and they discussed the matter of security for the loan from Respondent to Donoghoe.

Respondent states he was impressed with Donoghoe's apparent affluence (airplanes, boats, cars, diamonds) and it was arranged that Donoghoe would sell to the Respondent some jewelry worth from $100,000.00 to $200,000.00 for $44,000.00, with an option in Donoghoe to repurchase the jewelry within thirty days at the principal amount plus 9% interest. A document to this effect was drawn up between Donoghoe and the Respondent.

With the $32,000.00 ($32,500.00) loan from Bodenbender, the Respondent paid $10,000.00 to Fidelity Finance Corporation to pay off a loan to Donoghoe and

[4]In lawyer's language this is a misrepresentation. In Layman's language this is a lie.

[5]This was prior to June 15, 1972.

get a release of the jewelry they were holding as collateral. The remainder of the loan was used to keep Mr. Donoghoe's Pennsylvania clients from filing complaints with the Bar Association. To further carry out the plant, (sic) the Respondent borrowed $10,000.00 from his father.

The Respondent took possession of the jewelry in question and took it to a jewelry dealer for safekeeping, intent upon returning and claiming the jewelry at the end of thirty days in the event Donoghoe did not come up with the money.

On June 12, 1972, Donoghoe came into possession of a check in the amount of $105,000.00 in settlement of a claim. The check had a number of payees on it, including a lawyer by the name of Haddad in Miami, Florida (no relation to Frank Haddad). Donoghoe tried to cash the check at Liberty National Bank. The bank was somewhat suspicious of Donoghoe because of indications he had previously kited checks between banks in Louisville and Mr. Netherton from Liberty told Donoghoe to have the check certified.

In the meantime, Mr. Haddad of Florida called Netherton concerning a back check of Donoghoe's and Netherton mentioned the $105,000.00 check which had Haddad's name on it and Haddad said he hadn't endorsed it.

Donoghoe flew to Chicago and had the check certified and when Donoghoe presented the check again, Netherton wouldn't cash the check because of his conversation with Haddad concerning a possible forgery.

After the second refusal by Liberty to cash the check, Donoghoe consulted with the Respondent who proceeded to assist him in cashing the check. Donoghoe and the Respondent went to the Liberty National Bank and attempted to cash the check and were refused,

whereupon Heavrin became incensed, quoted some law about the UCC to the officer of the bank, and indicated he would take it to his bank at Citizens who would cash it.

Mr. Netherton of Liberty, having friends in the banking fraternity, attempted to call a friend at Citizens to warn him about the endorsement on the check, but was unable to reach him until Monday, June 19, 1972, at which time he alerted a Mr. Maple at Citizens of possible forged endorsements.

On June 15, 1972, Donoghoe gave a check for $49,000.00 to the Respondent to repay the loan the Respondent had made to Donoghoe, together with his fee. Within thirty minutes after the Respondent received the check from Donoghoe and deposited it to his account, Donoghoe called him and informed him that the check for $49,000.00 was no good because his wife had paid a series of large bills. Mr. Heavrin then wrote a check on his own account to Donoghoe in the amount of $49,000.00 which he admittedly did not have in his account.

On Friday, June 16, 1972, the Respondent presented the $105,000.00 check to Mrs. Maureen Colley (sic) at the Citizens Bank and Mrs. Colley's (sic) testimony is that Heavrin represented to her that he knew personally each person had endorsed the check.

Heavrin denies this[6] and, in fact, there is some controversy whether Heavrin endorsed the check in the presence of Mrs. Colley (sic) or had already endorsed it prior to presenting it to her.

In any event, there was some controversy prior to the cashing of the check but after consultation with bank officials, and the check bearing certification, the Citizens Fidelity cashed the check; whereupon, the

[6]The majority of the court believes Ms. Collie.

Respondent put $45,000.00 in his attorney account, $49,000 in his personal account and took $11,000.00 in cash which he turned over to Donoghoe.

On June 16, 1972, the Respondent wrote a check payable to cash for $35,000.00 on his Attorney at Law Account and later deposited the same in his Escrow Account at the Bank of Louisville. On the same day he drew a check to Donoghoe in the amount of $48,958.00 on his personal account, and further on June 19, 1972, he certified a $10,000.00 check on his Attorney at Law Account making it payable to himself, which was then placed in his Escrow Account with the Bank of Louisville.

On June 17, 1972, he deposited the $35,000.00 in his Escrow Account and made disbursements in the following sums:

$57.00 to Dennis O'Connor
$5,489.50 to Thomas B. Robertson, Sr.
$569.50 to James F. Donoghoe
$24,884.00 to Norman Bodenbender
$2500.00 to Don M. Heavrin
$1500.00 to Don M. Heavrin

A further recitation of facts is unnecessary, however, we deem it appropriate to note that eventually it was found the endorsement on the checks were either wholly or partially forged, and litigation arose between the Citizens Fidelity Bank and all parties, including the Respondent, Heavrin, to establish liability for the forged endorsements. The Judgment of the Jefferson Circuit Court found the Respondent, Heavrin, liable for $11,000.00 which the Bank turned over to him in cash personally and which he later gave to Donoghoe.

QUESTIONS PRESENTED

1. Does the Conduct of Heavrin With Respect to His Dealings With Donoghoe Constitute Unethical and Unprofessional Conduct Calculated to Bring the Bench and Bar of Kentucky Into Disrepute?

2. Is the Bar Association Barred From Bringing These Disciplinary Proceedings on the Grounds That the Decision of the Jefferson Circuit Court in the Civil Action is Res Judicata?

FINDINGS

On June 23, 1977, the Trial Committee duly appointed herein, filed a Trial Committee opinion, one member of the committee filing a dissenting Opinion, recommending that the Board of Governors dismiss the charges because Respondent alleged the Bar Association had not proceeded properly under the provisions of former RAP 3.160. On July 16, 1977, the Board of Governors entered the following order:

> 'Motion adopted by the Board of Governors referring the disciplinary matter concerning Donald M. Heavrin back to the Trial Committee with the direction that the Trial Committee file on or before September 9, 1977, a report in compliance with RAP 3.360. The report may still include a recommendation to dismiss for procedural defects.'

The Board feels the Respondent's conduct with respect to cashing the $105,000.00 check was in direct contravention of DR 1-102(A)(4). Further, the Board finds a violation of DR 9-102(A) relative to the separation of funds. No amount of check manipulating by the Respondent as went on in this case can be justified under the circumstances which are evident when the entire facts are documented. It is tragic the manipulations of the Respondent caused the financial losses documented in this sorbid affair.

The Board further finds the conduct of the Respondent constituted a reckless disregard for the rights of the payees on the checks in question and is a violation not only of Canon 9 of the Code of Ethics in regard to Trust Funds, but also DR 1-102.

The Board cannot accept the Respondent's explanation of his conduct, especially in view of the uncontroverted testimony that prior to his entering into this sordid check cashing affair, he was suspicious of Donoghoe's conduct. No attorney owes the duty to a client to enter into a course of action destined to lead to the bilking of innocent parties of their money. Once having entered into this course of conduct the Respondent then devoted most of his energy to the protection of his own financial interests and not to the protection of the parties rightfully entitled to the funds.

The Respondent's contention that disciplinary action in this case is barred under the doctrine of Res Judicata is not valid. Res Judicata prevents a retrial of a matter which has been decided on the merits, *9 ALR 3rd 210, Sec. 2(B)*. This matter has further been decided by the Court of Appeals in the case of *Ratterman* v. *Stapleton*, Ky., 371 S. W. 2d 939 (1963).

The Board differs with the Trial Committee in that a majority of the Board feels the conduct of the Respondent as set out above constituted conduct calculated to bring the bench and bar of Kentucky into disrepute[7] for the foregoing reasons."

This court has reviewed the record and a majority of the members are of the opinion that the record adequately

[7]This is a standard which is neither vague nor ambiguous. See Nicholson v. Judicial Retirement and Removal Commission, Ky., 562 S. W. 2d 306, Part I (1978).

supports the conclusions of the Board of Governors of the Kentucky Bar Association[8] that Heavrin is guilty of unprofessional conduct of sufficiently serious nature to warrant that he be suspended from the practice of law in this Commonwealth for a period of two years. The Board of Governors found that Heavrin had violated Canon 1 of the Code of Professional Responsibility which provides that a lawyer should assist in maintaining the integrity and competence of the legal profession. It found also that Heavrin violated Disciplinary Rule 1-102(A)(4) which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. The Board found also that Heavrin violated Canon 9 of the Code of Professional Responsibility which provides that a lawyer should avoid even the appearance of professional impropriety. It is the view of the majority of the members of this court that Heavrin was more interested in protecting his interests than that of his client and that he knew at all times what he was doing. It is also the view of the majority of the members of this court that Heavrin was not a "lamb led to the slaughter" by the artful cunning of a skilled con man, James F. Donoghoe, a former member of the Kentucky Bar Association who has previously been permanently disbarred.

It is therefore ordered that Donald M. Heavrin is hereby suspended from the practice of law in the courts of this Commonwealth for a period of two years and it is ordered that he pay the costs of these proceedings.

All concur except Palmore, C.J., and Clayton, J., who dissent.

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[8]This is a civil not a criminal proceeding. Proof by a preponderance of the evidence is all that is required. Louisville Bar Ass'n. v. Hubbard, 282 Ky. 734, 139 S. W. 2d 773 (1940); Commonwealth v. Ritchie, 114 Ky. 366, 70 S. W. 1054 (1902); see also Kentucky Bar Ass'n. v. Franklin, Ky., 534 S. W. 2d 459 (1976).

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SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

DISSENTING OPINION BY CHIEF JUSTICE PALMORE

The Trial Committee which heard the evidence in this case found Heavrin guilty of nothing more than bad judgment, and recommended unanimously that all charges against him be dismissed. Ten members of the KBA Board of Governors nevertheless found him guilty on the last four of seven counts.

Count 1 of the formal charges related to the alleged loan of money by Heavrin to Donoghoe, secured by a pledge of jewelry. Count 2 cited the circumstances of the loan to Heavrin by Bodenbender. Count 3 charged Hearvin with covering up ethical misconduct on the part of Donoghoe by borrowing money to pay the claims of his disgruntled clients. These are the three counts on which both the Trial Committee and the Board of Governors found Heavrin not guilty of any unethical conduct. The other four counts all relate to the handling of the $105,000 check and its proceeds and the exchange of worthless $49,000 checks between Heavrin and Donoghoe. This is the area in which the Board of Governors adjudged misconduct, and in which I do not concur in its judgment. After reading Heavrin's testimony from the perspective of how things appeared to him at the time each of the successive events took place, I am not convinced that his conduct justifies a mark of Cain that he will have to bear for the rest of his life.

Despite the large record in the bank case (which loses much of its importance with this court's unanimous rejection of the theory that the circuit court judgment forecloses the question of ethical misconduct), there really is not much in the way of conflicting evidence. The facts are virtually undisputed. The one question on which Heavrin and a witness differed is whether he told Miss Collie, at the Citizens Bank, that he had personal knowledge that the endorsements on the $105,000 check were genuine. She said he did. He denied it. The Board of Governors made no finding on that precise issue. The finding of the Committee was "There was no evidence of any unethical conduct in the cashing of the check.[1]

This is a very critical point to me because if I were convinced that Heavrin did lie to Miss Collie I probably would concur in the majority opinion. I think, however, that a lawyer standing in jeopardy of losing his livelihood and sustaining a permanent blemish on his reputation is entitled to the benefit of any reasonable doubt. Both Miss Collie and Heavrin gave their initial recollections of the conversation more than a year after it had taken place, and by that time each of them had an axe to grind. It was to her interest that she not appear to have been careless, because her employer, the bank, stood to lost $105,000 if found guilty of negligence.[2] And presumably it was in Heavrin's interest to resist any suggestion of intentional wrongdoing. There is no doubt that Heavrin himself believed the endorsements were good. Not only did he guar-

[1]It may fairly be inferred, moreover, from Miss Collie's testimony that in clearing the check she was chiefly influenced by the fact that it had been certified.

[2]Eventually the circuit court did find the bank negligent and held it liable for $94,000 of the loss, that being the amount still undrawn from Heaxrin's accounts when the bank discovered facts sufficient to put it on notice that one or more of the endorsements had been forged. Miss Collie, of course, was not in any way responsible for the bank's failure to act at that time.

antee them by adding his own enforsement, but he offered to and did to the best of his knowledge tell the bank, before it honored any checks drawn against the $94,000 deposited by him, where these endorsers could be reached in order that their signatures could be verified. I cannot convict him on the strength of the Collie exchange. Not many people can recall the precise details of past conversations with such Proustian accuracy as the majority of this court seems to ascribe to Miss Collie's version.

Donoghoe had been referred to Heavrin by Frank Haddad, then an official and later president of the Kentucky Bar Association. At this point in time, of course, the real Donoghoe had not been revealed to the world as it knows him now, serving a sentence in the penitentiary for bilking his clients. He was to all appearances a highly successful damage-suit lawyer. Like most big spenders, he was short on cash and behind in settling his accounts, but ostensibly had plenty of assets. Certainly Heavrin, so far as this record shows, had no reason to and in fact did not doubt his solvency or suspect that he was living in a house of cards that was about to collapse. Heavrin was simply an impressionable young lawyer with less than five years of practice, representing a proven moneymaker with lots of jewelry, big automobiles, and a showy home,[3] who had suddenly fallen into financial staits that must have seemed no more than temporary and accidental. As Heavrin saw it, and justly so, his job as a lawyer was to fight a rear-guard action until Donoghoe could regain his footing.

[3]Heavrin's description of Donoghoe: "At that time I was gullible and more or less totally impressed with the guy. The guy had a fantastic house, the best cars money can buy, the biggest cases of anybody I have seen in my life, made more money than I imagined to be on the face of the earth, telephones in his car, a cable address, pilot, adventurer, marine," etc. It is clear that Donoghoe was a con artist of masterful proportions, and was able to take Heavrin in as easily as he had gained the confidence of his own clients.

Donoghoe had collected some money from clients in Pennsylvania, and he said they were letting him borrow some or all of it for 9% interest. He was in arrears in settling with them, and when Heavrin came into the picture they had caused criminal charges to be brought against him. According to Donoghoe, he owed the Pennsylvania people $42,500, but the immediate problem was a $3,000 cold check he had sent them. The check matter was straightened out in short order, but between the Pennsylvania people and other creditors Donoghoe still owed about $44,000 and the Pennsylvanians were pressing for immediate satisfaction of their demands. Meanwhile, Donoghoe assured Heavrin that he was expecting in the near future a fee of $100,000 or more out of a hotel transaction in Owensboro and substantial fees from several other pending cases, including the one in Florida. In order to get the Pennsylvania clients off Donoghoe's back Heavrin undertook to borrow the necessary money himself, believing of course that Donoghoe would be able to repay it within a short time. First he applied to Bodenbender, who had only $32,500 available to lend, and later he got $10,000 from his stepfather in Atlanta.

Out of the $32,500 borrowed from Bodenbender, $10,000 was used to redeem out of hock some jewelry owned by Donoghoe, including a 10-carat diamond ring insured with Lloyds of London for $55,000. Heavrin's impression was that the jewelry had a value of between $100,000 and $200,000. To secure himself, he drew up and had executed an agreement by which Donoghoe sold him the jewelry for $44,000 subject to a right to repurchase it in 30 days for the same price plus 9% interest. Heavrin applied the remainder of the Bodenbender loan toward Donoghoe's debts, including partial payment of the Pennsylvania claims. Then the Pennsylvania people became importunate for the balance of their money, and this is when Heavrin resorted to his stepfather for the $10,000 loan. Except for an item

of $5489 still owing to one Thomas Robertson, the last of the money owed to the Pennsylvania clients was paid out of the $10,000. Donoghoe now owed Heavrin $42,500.

Shortly afterward, as Donoghoe had assured Heavrin would happen, one of the Donoghoe China clippers came sailing home full-laden. On June 6, 1972, a Chicago firm issued a $105,000 check in partial satisfaction of a judgment and settlement he had obtained in Florida incident to a wrongful death action. It was made out to Calvin Young, surviving father of Ray Edward Young, deceased; Donoghoe as administrator of the Ray Edward Young estate; Edgar Addington, surviving father of Carl Addington, deceased; Estill Barr as Administrator of the Carl Addington estate; and Donoghoe and a Florida law firm, their attorneys. Young resided in Raceland, Greenup County, Kentucky, and Addington and Blair lived in Whitesburg, Letcher County, Kentucky, though Heavrin thought they all lived in Whitesburg. In any event, at some time before the check was finally negotiated Donoghoe rented an airplane for the purpose, as Heavrin understood it, of going to Whitesburg to have it endorsed.

On Tuesday, June 13, Heavrin saw Donoghoe off on a plane trip to Miami to see the Florida lawyers, and on that day Donoghoe did in fact give Gilbert Haddad, a member of the Florida firm, a $22,000 check in payment of its share of the attorney-fees. On Thursday, June 15 Donoghoe presented the $105,000 check at the Liberty National Bank, in Louisville, where he had an account. It bore the endorsements of all the payees, though as we now know the endorsements other than Donoghoe's own had been forged by him. The bank declined to negotiate the check unless it was certified. Donoghoe then took a plane to Chicago, had the check certified, and on the next day, Friday, June 16, returned with it to the Liberty Bank. Meanwhile, however, by a rare coincidence Mr. Haddad, the Florida lawyer, had

telephoned the Liberty Bank to ask whether the check he had received from Donoghoe was good, had learned during this conversation with Mr. Netherton, an officer of the bank, that Donoghoe was seeking to negotiate the $105,000 check, and had advised the bank that he, Haddad, had never endorsed that check.

In view of this information from Haddad, Mr. Netherton again declined to negotiate the check, but concedes that he did not tell Donoghoe the reason why he would not do so. Heavrin, who accompanied Donoghoe to the bank on Friday, could not understand why the bank would not honor a certified check,[4] and suggested to Donoghoe that they take it over to the Citizens Bank, where Heavrin was a regular customer. Through Miss Collie, as we know, Citizens honored the check, paying Hearvin $11,000 in cash and crediting $49,000 to his personal account and $45,000 to his business account.

Meanwhile, on Thursday the 15th the exchange of worthless $49,000 checks had taken place. On that day Donoghoe gave Heavrin a $49,000 check drawn on the Liberty Bank to cover the $42,500 Heavrin had borrowed and paid out for him plus a fee for Heavrin's services. Heavrin deposited it in his bank account at Citizens, but very shortly thereafter Donoghoe came to Heavrin's office and wanted the check back because his wife had written some other checks, that would deplete his bank account.[5] When Heavrin told him he had already deposited the check, Donoghoe asked Heavrin to write him a check in the same amount so that he, Donoghoe, could deposit it. Heavrin complied.

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[4]According to Heavrin, the reason given by Netherton was that it was "drawn on uncollected funds."

[5]Though Donoghoe did not testify in the bank case or in this proceeding, when he gave Heavrin the $49,000 check he was about to deposit the $105,000, and it might reasonably be surmised that the Liberty Bank's unexpected refusal to credit the $105,000 check to his account was the real reason he came to Heavrin's office to retrieve the $49,000 check.

On the next day the checks were returned by the respective banks, to no one's loss. Unorthodox as this transaction may have been, there was no intent, on Heavrin's part at least, to injure or defraud anyone, and no injury or fraud resulted from it.

Returning now to Friday, June 16, 1972, the day on which the $105,000 check was negotiated at the Citizens Bank, it is necessary to introduce other background details to facilitate understanding Heavrin's handling of the money. As we have said, he understood that Donoghoe had been to Whitesburg to see the clients there, and he knew he had gone down to Miami to see the Florida lawyers. It was not unreasonable for him to assume that the necessary endorsments on the check had been procured in the course of these visits. Donoghoe had told him that he had a 50% contingent-fee arrangement with the clients.[6] Heavrin also had the impression from Donoghoe that the $105,000 was part of a settlement that amounted to $175,000 or $180,000, though actually the total was $130,000 (an $80,000 judgment on the Young claim and a $50,000 settlement of the Addington claim).[7]

Heavrin kept an escrow account in the Bank of Louisville, several blocks distant from the main office of the Citizens Bank where the $105,000 transaction took place. In the Citizens Bank he maintained two accounts, a business account for his office transactions (which he called his "legal account") and a peronal account for his private or household affairs. When the bank honored the $105,000 check, Heavrin gave Donoghoe $11,000 in cash and deposited $49,000 in the personal account and $45,000 in the

[6]In fact, it was a 40% contract.

[7]Unbeknownst to Heavrin, Donoghoe had previously received and forged the endorsement of Calvin Young on a $20,000 check made out to him and Young. The remaining $5,000 had already been paid in the form of still another check, which is not involved here.

office account. At this point it is important to understand that these two deposits in Heavrin's bank accounts at Citizens were made for the sake of temporary convenience, and not through any intent to commingle clients' funds with personal funds. The transaction took place toward the end of banking hours on Friday, June 16, 1972. The Bank of Louisville, where Heavrin kept his escrow account, was several blocks away. Donoghoe was in a hurry, because, as Heavrin understood it, "he was going to drive down or fly down to Whitesburg and pacify the clients and Estill Blair . . . who knew all the families and who was the executor of one of the estates. Mr. Blair had been in Louisville either a day or two days before that to get money out of the settlement for the purpose of paying immediate bills that were pressing down on these people, and Donoghoe's comment was that out of a case where he had earned 80 some-odd thousand dollars . . . he had gotten to keep $1,000. He was going to keep $1,000 and take $10,000 to those people."

According to Heavrin, Blair had come to town very shortly after Donoghoe received the $105,000 check, "and it had taken such a long time to get the money after the settlement of this case that the people down there were committed on some financial obligations that had to be met, and they were not particularly anxious to have to wait for a check to be deposited and clear the bank, and so Blair came up to Louisville to get cash to satisfy their immediate financial needs. That was one of the things he [Donoghoe] objected to when I asked him to have the check certified. He objected because Blair was in Louisville and he wanted the money. So he apparently worked out some arrangement where Blair went back to Whitesburg and the agreement seemed to be that he would then personally deliver the money down there to those people."

So much for the $11,000 in cash. The two bank accounts at Citizens were utilized merely as conduits for the remain-

ing $94,000. The $45,000 deposited in the office account was promptly checked out and deposited in his escrow account at the Bank of Louisville for use in paying off Donoghoe's accounts, including what he owed Heavrin.[8] In other words, Heavrin received $45,000 for the purpose of satisfying the outstanding claims against Donoghoe, which he proceeded to do, through checks drawn on his escrow account. The other $49,000 was for Donoghoe to distribute to his clients, and was deposited in Heavrin's personal account so that Heavrin could give Donoghoe a check instead of $49,000 in cash. Accordingly, Heavrin drew a check to Donoghoe for $48,958 that same afternoon.[9]

To summarize the transaction at Citizens Bank on June 16, out of the $105,000 check Donoghoe got (in round figures) $60,000, $11,000 of which was cash and $48,958 was in the form of a check from Heavrin, and the remaining $45,000 was processed through Heavrin's personal account at Citizens Bank into his escrow account at the Bank of Louisville. Heavrin proceeded to disburse the $45,000 as agreed, and Donoghoe, presumably, made off with the $60,000. Heavrin's explanation for having placed the money in two different bank accounts at Citizens was to the effect that he wanted to keep the money he was going to disburse, and for which he regarded himself as accountable, separate from the money going directly to Donoghoe.

There are a few knots and kinks in the factual picture of this case that this writer has not been able to unravel. For example, there is the $42 difference between the $49,000 deposited in Heavrin's personal account and the $48,958 he checked out of it to Donoghoe. That it was later reimbused to Donoghoe as a part of the $569.50 drawn by

[8]One payment out of this fund was a $569.50 check to Donoghoe, which Heavrin explained was to reimburse him for the amount of a miscalculation in computing the total of outstanding debts.

[9]This $42 difference between the $49,000 deposit and the $48,958 check was reimbursed to Donoghoe in the $569.50 check mentioned in footnote 8.

Heavrin on his escrow account was brought out in the testimony, but why the difference in the first place is one of those little mysteries to which the lawyers in the case apparently knew the answer already and did not attempt to get into the record. Nevertheless, neither this particular hiatus nor any of the other unanswered puzzles inhering in the record provide any supportive basis for the charges of ethical misconduct against Heavrin.

At this point, it ought to be brought to the reader's attention that the formal charges initiated against Heavrin by the Inquiry Tribunal contained no reference whatever to the Canons or Disciplinary Rules, but alleged facts only. The rules and principles alleged to have been violated were selected at the end rather than the beginning of the process, both figuratively and literally as an afterthought. Somewhat in the style of Alice's Queen of Hearts, the Board evidently convicted Heavrin first and then decided what it had convicted him for. This may comport with due process, but it makes me think that perhaps Heavrin had been right all along in insisting that from the beginning the charges were never sufficient.

The KBA Board of Directors concluded that Heavrin's conduct with respect to the $105,000 check violated DR 1-102(A)(4), which provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Except for the alleged misrepresentation to Miss Collie, concerning which I do not believe the evidence is sufficient to justify a finding of guilt, it is very clear to me that there is no basis whatever for condemning Heavrin under this rule, which is directed at intentional or wilful misconduct as distinct from negligence or bad judgment.

The next respect in which the Board found Heavrin guilty was that he violated DR 9-102(A) "relative to the separation of funds. No amount of check manipulating . . . as went on in this case can be justified under the

circumstances which are evident when the entire facts are documented." This finding shakes me to the very foundation, because it could only have resulted from a failure to study this record thoroughly and then to think about it long enough. Even one complete reading of the evidence would not bring to a lawyer of average mentality (at least this one) a sufficient grasp of the details to mount a fair perspective. Heavrin himself, for example, testified at length on three different occasions, and one must go back and forth among these three transcripts in order to fill in the gaps and fit the pieces together. The process of gathering, collating, arranging and compressing the pertinent evidence into the simple narrative set forth in this dissenting opinion certainly has consumed more of the writer's time than might appear at first blush.

DR 9-102(A) condemns the mingling of a lawyer's funds with those of his client. No one has cited any authority for the proposition that it cannot be done with the knowledge and consent of the client. The client in this instance was Donoghoe. Everything that was done was with his knowledge and for his convenience and, to the extent that any "commingling" occurred, it was done in his very presence and under his supervision. But even if that were not a sufficient answer to the charge of commingling, there was no real commingling here anyway. $49,000 was put into one of Heavrin's accounts so that he could give Donoghoe a check instead of cash. The other $45,000 was put in his office account so that he would write a check to his escrow account in another bank and then distribute the money as directed by his client, which he did. Except for the insignificant $42 mentioned earlier in this opinion, the deposit and transfer of these funds were completed almost contemporaneously. None of the money remained in either of Heavrin's private accounts long enough to get warm, much less to find a new home. I cannot believe the members of the Board thought this through.

The last references by the Board to specific rule violations are that Heavrin's conduct "constituted a reckless disregard for the rights of the payees on the checks [sic] in question and is a violation not only of Canon 9 of the Code of Ethics in regard to Trust Funds, but also DR 1-102."

Both Canon 9 and DR 1-102 cover a good deal of territory. Canon 9 says, "A lawer Should Avoid Even the Appearance of Professional Impropriety." The Ethical Considerations and Disciplinary Rules following Canon 9 all provide specific applications of that broad precept. Except for the matter of commingling funds, which I have already discussed, none of them comes close to this case. DR 1-102 declares it misconduct to (1) violate a Disciplinary Rule, (2) circumvent a Disciplinary Rule, (3) engage in illegal conduct involving moral turpitude, (4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, (5) engage in conduct that is prejudical to the administration of justice, or (6) engage in any other conduct that adversely reflects on his fitness to practice law. Thus far, I do not see that Heavrin violated or circumvented any of the Disciplinary Rules mentioned by the Board, and I do not believe anyone involved in this proceeding would claim that he engaged in illegal conduct. If he did, apparently the grand jury of Jefferson County never got word of it. Item (4), as I have suggested before, refers to intentional deceit. Item (5) pertains to the administration of justice and obviously can have no application to this case. Only Item (6), "conduct that adversely reflects on his fitness to practice law," could possibly be argued as appropriate to the charge that Heavrin disregarded the rights of the payees of the $105,000 check.

Some years ago, in Kentucky State Bar Association v. Taylor, Ky., 482 S. W. 2d 574, 582 (1972), we made the following observation: "If the canons of ethics adopted for the legal profession were tested under the 'void for vague-

ness' doctrine which has spelled the doom or various breach of peace and disorderly conduct laws throughout the country it is doubtful that they would survive this case." I repeat that observation here. Although this is not a criminal case, and the principles of constitutional law applicable to criminal cases are not entirely applicable here, the right to engage in a professional practice, once earned, is a right of great value, and its loss by revocation or suspension is nearly as serious a punishment as a criminal conviction and sentence. Without attempting to research and write a law review article on the subject, I think the due process rights of a respondent in a disciplinary proceeding which may result in the loss or suspension of his license to practice can be no different from those of a defendant in a criminal case. In fine, the law under which he is being tried must be clear, and the charge must be specific. In this proceeding neither of those requirements has been satisfied.

"Conduct that adversely reflects on his fitness to practice law." But what standard? And more importantly, by whose standard? The answer is unavoidable—the subjective standard of whoever happens to be doing the judging. So far as I am concerned, that cannot be the law in a civilized society—not in this country, anyway.

Assuming, however, that I am wrong in holding the opinion that this undefined standard of conduct, uncoupled with some other more specific violation, cannot be a valid basis for disciplinary action, let us take one last look at the culpability, vel non, of Heavrin's conduct toward Donoghoe's clients.

The first thing that must be remembered is that he believed Donoghoe and trusted Donoghoe.[10] He thought

[10]It is interesting to note that at one point during the course of getting the $105,000 check negotiated Heavrin actually thought about calling Mr. Blair in Whitesburg to make sure it was all right, but changed his mind out of a feeling of guilt for mistrusting Donoghoe, who, as Heavrin put it, had never lied to him.

Donoghoe had 50% of the money coming to him as a fee.[11] The $60,000 turned over to Donoghoe was ample to satisfy his clients.[12] The endorsements on the check, which Heavrin assumed to be genuine, gave witness than the clients trusted Donoghoe with the proceeds of the check. Indeed, had Heavrin merely given Donoghoe the whole $105,000 in cash, this proceeding would never have arisen. As it is, he took care to see that out of the share of the money he thought was Donoghoe's, Donoghoe paid his debts. It just did not occur to him that Donoghoe, with what Heavrin thought to be enough money to settle with his clients, would not do so.

Gullible, yes. Careless, probably. Moral turpitude, no. Suspension from practice, emphatically no. I simply feel that my obligation as a judge compels me to protest this result.

Clayton, J., concurs in this dissent.

[11]At that time we had not yet decided First Nat'l Bank of Louisville v. Progressive Cas. Ins. Co., Ky., 517 S. W. 2d 226, 230 (1975), holding that an attorney has no proprietary interest in money collected for his client until he has delivered it over to the client. (That case arose out of another of Donoghoe's criminal excursions.)

[12]The $45,000 payment to Heavrin also operated to redeem Donoghoe's jewelry, which now became an unencumbered asset of considerable value.

SUPREME COURT OF KENTUCKY

78-SC-278-KB

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

ORDER GRANTING STAY OF EXECUTION AND ENFORCEMENT OF MANDATE

On motion of the respondent, Donald Heavrin, a stay of execution and enforcement of this Court's mandate of January 3, 1979, is granted for a period to and including April 9, 1979, in order that respondent may make application to the Supreme Court of the United States for a writ of certiorari.

Any additional request for stay deemed necessary should be addressed to the Supreme Court of the United States.

Entire Court sitting. All concur.

ENTERED January 8, 1979.

(s) John S. Palmore
Chief Justice

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

CHARGE

Comes now the Kentucky Bar Association, by and through its Inquiry Tribunal, and states that Respondent Donald M. Heavrin, whose last known address is 914 Republic Building, Louisville, Kentucky 40202, a member of said association, did engage in the following professional and unethical conduct:

I

In or about the spring of 1972, Respondent began representing James F. Donoghoe, a former member of the association, in a criminal proceeding in Jefferson County Court and in Mr. Donoghoe's negotiations with some of his clients. In or about 1972, Respondent loaned his client, Mr. Donoghoe, certain funds to be used to pay Mr. Donoghoe's clients in Pennsylvania who include one Thomas C. Robertson and who were demanding certain trust funds. In order to secure himself in said loan, Respondent accepted a bill of sale from Mr. Donoghoe for certain jewelry which Mr. Donoghoe would have the right to repurchase within thirty days. Respondent thereby took a proprietary interest in the representation of his client, Mr. Donoghoe.

II

Within the same facts and circumstances as related in Count I above, Respondent obtained part of the said monies

with which to loan to Mr. Donoghoe from Norman Bodenbender, whose last known address is Trustcon, Inc., Greenville, Indiana. Respondent misrepresented the purpose of said loan as being for a real estate deal which would take a short time to repay. Respondent met Mr. Bodenbender and borrowed $32,500. Later, Respondent borrowed $10,000 from his father to be loaned to Mr. Donoghoe.

III

Within the same facts and circumstances as related in Count I above, Respondent learned that some of Mr. Donoghoe's clients were going to report Mr. Donoghoe's conduct to the bar association. In order to keep said clients from so reporting, Respondent started paying the said clients from the borrowed funds, and Respondent thereby participated in covering up alleged unethical conduct of a member of the bar.

IV

Within the same facts and circumstances as related in Count I above and in or about June, 1972, Mr. Donoghoe received a settlement check in the amount of $105,000 from a civil action in which he represented certain plaintiffs. Said check was made payable to Calvin Young, surviving father of Ray Edward Young, deceased; Mr. Donoghoe as administrator of Mr. Young's estate; Edgar Addington, surviving father of Carl Addington, deceased; Estill Blair, administrator of Mr. Addingtons estate; and to Mr. Donoghoe and a Florida law firm as attorneys. Because Mr. Donoghoe was experiencing difficulty in negotiating said check, Respondent went with Mr. Donoghoe to Citizens Fidelity Bank and Trust Company, Louisville, Kentucky, where Respondent had an office and personal account. There, Respondent endorsed said check and falsely informed bank officer Maureen Collie that he personally knew that all endorsements were properly made. The check was

then cashed. A true and accurate copy of said check is attached hereto, made a part hereof and marked as "Exhibit A." The endorsments on said check, with the exception of Respondent's and Mr. Donoghoe's were forged.

V

Within the same facts and circumstances as related in Count IV above, Respondent received from Citizens Fidelity Bank and Trust Company $11,000 in cash whereupon he handed the same to Mr. Donoghoe. Respondent deposited $49,000 of the said settlement funds into his own personal account at Citizens Fidelity Bank, being Account No. 205-926-6. Respondent also deposited $45,000 to his own attorney-at-law account being Account No. 003-764-8. Respondent further commingled said funds with his own by depositing, on or about June 17, 1972, $35,000 from his said attorney at law account to his own escrow account at the Bank of Louisville, Louisville, Kentucky. From Respondent's escrow account at the Bank of Louisville, Respondent subsequently issued drafts to various persons including himself none of whom, other than Mr. Donoghoe, were payees of the said settlement check.

VI

Within the same facts and circumstances as related in Count V above, Respondent knew the proceeds from said check were intended for certain payees. He was the last endorser. After cashing said check, Respondent did nothing to protect the payees and participated in the misappropriation of said funds.

VII

In or about June, 1972, Mr. Donoghoe gave to Respondent a check for $36,000 to be used to partially repay loans that Respondent had given to Donoghoe. After depositing said check, Mr. Donoghoe informed Respondent that there were insufficient funds to cover his check. Respondent,

thereupon, wrote his own check to Mr. Donoghoe for $36,000 with actual knowledge that he did not have sufficient funds to cover his check. Both checks were returned because of insufficient funds.

WHEREUPON, Complainant charges that such actions by Respondent constitute unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute; and that discipline of an appropriate degree should be administered to Respondent in accordance with RAP 3.380.

Kentucky Bar Association
By: (s) William P. Donan, Chairman
Inquiry Tribuntal

Attest:
(s) Leslie G. Whitmer, Director
Kentucky Bar Association

RULE 3.160(a), SUPREME COURT OF KENTUCKY

"INITIATION OF DISCIPLINARY CASES"

"Any complaint against an attorney for unprofessional conduct shall be filed with the director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge the receipt of the complaint or respond to the merits."

Rule 3.170
Rule 3.230
Rule 3.360
Rule 3.370
Rule 3.410

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

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TRIAL COMMITTEE OPINION

At its first hearing on March 11, 1977, the Trial Committee was requested by Dolnad M. Heavrin, through his counsel, to dismiss all charges because of an alleged procedural defect violating Mr. Heavrin's federal and state constitutional rights. The Trial Committee, with one dissent, feels that the respondent's arguments of violation of due process and equal protection have merit and accordingly recommend to the Board of Governors that all charges be dismissed.

The heart of Mr. Heavrin's claim is that the Kentucky Bar Association utterly failed to comply with Rule 3.160 in the initiation of this disciplinary case. That rule, which is the only rule that provides for initiation of disciplinary cases, provides:

> "Any complaint against an attorney for unprofessional conduct shall be filed with the director who shall promptly notify the attorney by a certified mail of the complaint and inform him that he has 15 days to acknowledge receipt of the complaint or respond to the merits."

The facts of the initiation of this disciplinary proceeding are really not in dispute. The Bar Association received a letter from the Commonwealth Attorney of Jefferson

County to the effect that the Bar Association should look into Mr. Heavrin's conduct which had come to light in a civil proceeding in Jefferson Circuit Court, Case No. 174698, styled "Citizens Fidelity Bank and Trust Company vs. Donald M. Heavrin, et al.". For whatever reason, the Bar Association decided to keep this letter from the Jefferson Commonwealth Attorney undisclosed to respondent. On August 15, 1973, the Kentucky Bar Association wrote a letter to Donald Heavrin in which the Director of the Association stated, "Please accept this letter as a notice of complaint filed against you pursuant to the provisions of RCA 3.160." Mr. Heavrin was not told that the complaint had been initiated by the letter from the Jefferson Commonwealth Attorney and he was not given a copy of this letter.

Mr. Heavrin responded by counsel to the letter of August 15, 1973, by a letter from his counsel dated August 16, 1973, requesting that the matter be abated during the pendency of the Jefferson Circuit Court action.

The Bar Association having agreed to abate the proceedings, and those proceedings having finally run their course, on June 10, 1976, the Bar Association again wrote to Donald M. Heavrin, stating:

> "An investigation by authority of this office has caused the following allegations to be made by this office, and you should regard them as a formal complaint issued against you."

Mr. Heavrin responded by counsel and the matter proceeded to the Inquiry Tribunal, where formal charges were prepared, and then to the Trial Committee.

There can be no doubt that the technical language of Rule 3.160 was violated by the Bar Association. The complaint against the respondent for unprofessional conduct came from the Jefferson Commonwealth Attorney, in the

form of a letter, and Mr. Heavrin was not notified of the complaint and was not given a copy of the complaint.

The trial committee feels that Rule 3.160 was written for a purpose, and that purpose was to give the attorney against whom some complaint has been made an opportunity not only to know that he is under an investigation but an opportunity to know the person who is making the complaint and the nature thereof. Mr. Heavrin wasn't given this opportunity.

To rule in this case that the Bar Association complied with Rule 3.160 would be to invite a practice wherein secretive complainants and undisclosed informants clandestinely report to the Bar Association the activities of lawyers, giving the Bar Association an opportunity to fully conduct an investigation without informing the attorney involved.

It may very well be that the Bar Association feels that it must proceed in this matter in order to achieve adequate discipline over lawyers. However, it does so in violation of Rule 3.160.

(s) Lloyd E. Rogers, Chairman
(s) Joe C. Savage

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - *Complainant*

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DONALD M. HEAVRIN - - - - - *Respondent*

REPORT OF TRIAL COMMITTEE

FINDINGS OF FACT

The trial committee deems the following facts proven by the preponderance of the evidence.

Charge I

The respondent loaned money to a client. Heavrin Deposition pp. 50-51.

Charge II

The respondent borrowed money from Mr. Bodenbender without disclosing the true purpose of the loan. There was no reliance by Bodenbender upon any representation of the respondent.

Charge III

Any information or knowledge of Donoghoe's unethical conduct was gained through the client-attorney relationship and was therefore privileged.

Charges IV, V, VI

The doctrine of res judicata is not applicable in the instant case. The respondent was without prior knowledge of any forgeries. There was no unlawful co-mingling of funds. There was no evidence of any unethical conduct in the cashing of the check.

Charge VII

The checks exchanged by the respondent and Mr. Donoghoe were returned for insufficient funds.

CONCLUSIONS OF LAW

Charge I

While the respondent did loan money to a client, this in and of itself is not unethical conduct. EC 5-8. It is only where the attorney acquires a proprietary interest in the cause of action or subject matter of litigation that loans become unethical. DR 5-103(A). Even then there are exceptions. DS 5-103(A)(1)(2). Here, the respondent, through the guise of a purchase-sell back arrangement, loaned money to a client, a client whom he was representing in a criminal matter. The preponderance of the evidence does not support a finding or conclusion that the respondent in making the loan acquired a proprietary interest in a cause of action or the subject matter of any litigation.

Charge II

The loan to the respondent is not violative of the Disciplinary Rules. While the respondent did not disclose the true reason for obtaining the loan, there was no reliance by the lender on any misstatements of the respondent. The lender's deposition indicates that it made no difference as to the purpose of the loan, only the interest and time. See Bodenbender Deposition. There was no illegal conduct by the respondent in obtaining this loan.

Charge III

While respondent, as a member of the bar, is required to disclose to knowledge of unethical conduct, his knowledge of Mr. Donoghoe's conduct was privileged by virtue of the attorney-client relationship. Since the knowledge was privileged, his efforts in seeing that clients were paid is not a violation of the Disciplinary Rules.

Charges IV, V, VI

While the committee does not accept respondent's position that the doctrine of res judicata applies to these

charges, it does conclude that there was no violation of the Disciplinary Rules.

Charges VII

The evidence does not support a violation of any Disciplinary Rules.

RECOMMENDATION

It is readily apparent that while the respondent may have been guilty of bad judgment in a number of dealings with Mr. Donoghoe, so were many others. Bad judgment, though it sometimes leads to unethical conduct, is not grounds for disciplinary action. In view of the foregoing, it is the recommendation of the committee that all charges against the respondent be dismissed.

(s) Joe C. Savage
(s) Lloyd E. Rogers
(s) Victor Fox

Opinion Rendered October 31, 1978

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION

v.

DONALD M. HEAVRIN

File No. 78-SC-278-KB

Appeal from Supreme Court

MANDATE

It is therefore ordered that the Respondent, Donald M. Heavrin, be and he is hereby suspended from the practice of law in this Commonwealth for a period of two (2) years.

It is therefore considered that the Respondent is further ordered to comply with RAP 3.390. A copy of which is attached and considered included as a part of this mandate.

It is further ordered that Respondent be required to pay the costs in this proceedings.

January 3, 1979 Respondent's Petition for Rehearing Denied.

A Copy—Attest:

(s) Martha Layne Collins
Clerk

Issued January 3, 1979

Rule 3.390 Notice to Client of Suspension or Disbarment

There shall be contained in every final order of suspension of more than two (2) months or disbarment a direction that such suspended or disbarred attorney notify all clients for whom he is actively involved in litigation and

similar legal matters of his inability to continue to represent them, and of the necessity and urgency of promptly retaining new counsel. Such notification shall be by letter duly placed in the United States mail within ten (10) days of the date the order of suspension or disbarment is placed of record, and such former attorney shall retain carbon copies of all such letters for inspection by duly authorized agents of the Court or the Association.

Failure to do so shall subject the responden to a charge of contempt of Court.

[This amendment replaces existing Rule 3.390.]

OPINION OF JEFFERSON CIRCUIT COURT, JUDGE JAMES HUBBS, IN *CITIZENS FIDELITY BANK & TRUST CO.* v. *DONALD M. HEAVRIN, ET AL.*, #174698, JEFFERSON CIRCUIT COURT, CHANCERY BRANCH, SECOND DIVISION

"As to the claim by Citizens Fidelity Bank and Trust Company against the Defendant Donald M. Heavrin, said Defendant is the last endorser.

Heavrin had nothing to do with the forgery and there was no conspiracy; he was acting as the attorney for Donoghoe. Heavrin had received and disbursed ELEVEN THOUSAND DOLLARS ($11,000.00) on June 16, 1972, when the check in question was initially deposited. He knew nothing about any of the questionable endorsements until his conversation with Dan Ulmer on Monday morning, June 19, 1972. In the conversation, the telephone number of the Haddad law firm in Florida was discussed *as well as the address of one or two of the other parties listed on the check as 'endorsees'.**

In the Findings of Fact and Conclusions of Law filed herewith relative to the claim of Calvin Young, the Court has already stated that Citizens Fidelity Bank and Trust Company violated good banking standards in not holding

the balance of the funds in the bank until the authenticity of all endorsements had been safely established. After Heavrin ascertained the possibility of the questionable endorsements, he was under the same duty as the bank to take all necessary precautions to protect all parties involved including the bank. Had Heavrin known about the aminous telephone conversation between Dan Ulmer, Executive Vice President of Citizens Fidelity Bank and Trust Company, and the Florida law firm, he still would have been under the same duty as the bank. However, the Court finds that a short time thereafter, (possibly an hour or so) Heavrin called Mr. Ulmer's office and was informed by his secretary that everything had been cleared up and the ONE HUNDRED FIVE THOUSAND DOLLAR ($105,000.00) check would be honored. This testimony is critical in the Court's mind because (1) it was not denied and (2) the balance of the proceeds was 'turned loose.' There was no further need for Heavrin to be concerned as to the genuineness of any of the endorsements on the certified check. He was never told about Mr. Ulmer's conversation with the Haddad firm in Florida and the proof clearly shows that Heavrin knew nothing further about the transaction for some nine months thereafter.

Citizens Fidelity Bank and Trust Company cannot hold Heavrin liable for the balance of the proceeds because of its own assurances to Heavrin that all questions had been cleared up concerning the endorsements. *J. M. Robinson Company* v. *The Bank of Pineville,* 142 SW 1065. The Court finds that Heavrin endorsed the check in blank as a last endorser and he is liable to the bank for the ELEVEN THOUSAND DOLLARS ($11,000.00) given when the check was first presented for deposit. This was before Maurine Collie, who authorized the transaction, knew anything concerning the questionable endorsements.

Counsel for the Defendant will prepare a judgment in accordance with these Findings." (Emphasis ours).

PAGE 6, FINDINGS OF THE BOARD OF GOVERNORS, KENTUCKY BAR ASSOCIATION

On June 23, 1977, the Trial Committee duly appointed herein, filed a Trial Committee opinion, one member of the committee filing a dissenting opinion, recommending that the Board of Governors dismiss the charges because Respondent alleged the Bar Association had not proceeded properly under the provisions of former RAP 3.160. On July 16, 1977, the Board of Governors entered the following order:

> "Motion adopted by the Board of Governors referring the disciplinary matter concerning Donald M. Heavrin back to the Trial Committee with the direction that the Trial Committee file on or before September 9, 1977, a report in compliance with RAP 3.360. The report may still include a recommendation to dismiss for procedural defects."

The Board feels the Respondent's conduct with respect to cashing the $105,000.00 check was in direct contravention of DR 1-102(A)(4). Further, the Board finds a violation of DR 9-102(A) relative to the separation of funds. No amount of check manipulating by the Respondent as went on in this case can be justified under the circumstances which are evident when the entire facts are documented. It is tragic the manipulations of the Respondent caused the financial losses documented in this sordid affair.

The Board further finds the conduct of the Respondent constituted a reckless disregard for the rights of the payees on the checks in question and is a violation not only of Canon 9 of the Code of Ethics in regard to Trust Funds, but also DR 1-102.

The Board cannot accept the Respondent's explanation of his conduct, especially in view of the uncontroverted

testimony that prior to his entering into this sordid check cashing affair, he was suspicious of Donoghoe's conduct. No attorney owes the duty to a client to enter into a course of action destined to lead to the bilking of innocent parties of their money. Once having entered into this course of conduct the Respondent then devoted most of his energy to the protection of his own financial interests and not to the protection of the parties rightfully entitled to the funds.

The Respondent's contention that disciplinary action in this case is barred under the doctrine of Res Judicata is not valid. Res Judicata prevents a retrial of a matter which has been decided on the merits, *9 ALR 3rd 210, Sec. 2(B)*. This matter has further been decided by the Court of Appeals in the case of *Ratterman* v. *Stapleton*, Ky., 371 S. W. 2d 939 (1963).

The Board differs with the Trial Committee in that a majority of the Board feels the conduct of the Respondent as set out above constituted conduct calculated to bring the bench and bar of Kentucky into disrepute for the foregoing reasons.

LETTER DATED AUGUST 15, 1973, TO THE PETITIONER, DONALD M. HEAVRIN, FROM THE KENTUCKY BAR ASSOCIATION

KENTUCKY BAR ASSOCIATION
Frankfort, Kentucky 40601
August 15, 1973

CONFIDENTIAL

Donald Heavrin, Esquire
914 Republic Building
Louisville, Kentucky 40202

Dear Mr. Heavrin:

Please accept this letter as a notice of complaint filed against you pursuant to the provisions of RCA 3.160. In

accordance with this rule, you are given fifteen (15) days from the date of this letter to respond to the complaint. This matter will be treated in accordanec with RCA 3.170 et sequi.

It appears that on or about June 16, 1972, one James F. Donoghoe, Jr., of Louisville, tendered to you a settlement check drawn on the account of Lord, Bissell and Brook in the amount of $105,000 belonging to Mr. Donoghoe's clients, Calvin Young, deceased, Edgar Addington, and the Estate of Carl Addington. A copy of the check with endorsements is enclosed. It appears that you endorsed the check after Mr. Donoghoe's endorsement and proceeded to cash the check on or about June 16, 1972. It further appears that the endorsers of the payees on the check are forgeries except Donoghoe's signature. The check in question was cashed at Citizens Fidelity Bank & Trust Company of Louisville. From the $105,000, you made the following transactions:

1. Placed $49,000 in your personal account #205-926-6, and
2. Deposited $45,000 in your attorney-at-law account #003-764-8, and
3. Took the balance of $11,000 in cash into your possession.

It appears that on or about June 16, 1972, you wrote a $35,000 check payable to cash on the attorney-at-law account and deposited the same in your escrow account at the Bank of Louisville. On June 16, 1972, you drew a check to Donoghoe in the amount of $48,958 on your personal account. On June 19, 1972, you certified a $10,000 check on your attorney-at-law account made payable to yourself which was deposited in your escrow account.

On June 17, 1972, you deposited the aforesaid $35,000 in your escrow account and made the following disbursements:

$57.00 to Dennis O'Connor
$5,489.50 to Thomas C. Robertson, Sr.
$569.50 to James F. Donoghoe
$24,884 to Norman Bodenbender, American Bank, New Albany, Indiana
$2,500 to Don M. Heavrin
$1,500 to Don M. Heavrin

The clients named on the check have never received their funds.

No contacts or communications shall be undertaken with the Inquiry Tribunal, House of Delegates, Board of Governors, Court of Appeals, or any member thereof. Please observe the provisions of RCA 3.150 and 3.290 with respect to the foregoing communications or contacts.

Please file your response within the stated time to expedite the necessary procedures. If you have any questions concerning the matter, please contact us.

Sincerely

(s) Leslie G. Whitmer
Director

LGW/sp
Enclosure
CERTIFIED MAIL

PAGES 1, 2, 3, 4 AND 5, KENTUCKY BAR ASSOCIATION'S BRIEF BEFORE THE SUPREME COURT OF KENTUCKY

SUPREME COURT OF KENTUCKY

No. 78-SC-278-KB

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

RESPONSE TO NOTICE FOR REVIEW

May It Please the Court:

STATEMENT OF THE CASE

On or about August 15, 1973, an attorney filed a letter in the Office of the Director of the Kentucky Bar Association raising allegations that respondent had engaged in unethical and unprofessional conduct with respect to the extraordinary circumstances surrounding the cashing and distribution of the proceeds of a certain check in the amount of $105,000.00. The letter was supported by photostatic copies of three sworn affidavits and the check in question. The Director mailed a confidential letter dated August 15, 1973, to respondent by certified mail pursuant to former RCA 3.160 formally notifying respondent that a complaint was being made against him. The Director's letter of notice did not contain copies of the actual documents that had been filed with the Director. However, the letter of notification accurately and fully informed respondent in detail of all the factual allegations of misconduct which were contained in the actual documents.

By letter dated August 16, 1973, respondent's counsel replied to the Director's letter of notice and formally requested in accordance with former RCA 3.180(b) that proceedings before the Kentucky Bar Association be held in abeyance pending the outcome of litigation in the Jefferson Circuit Court styled Citizens Fidelity Bank and Trust Company v. Donald M. Heavrin, et al., Civil Action No. 174698. On September 5, 1973, the Inquiry Tribunal granted respondent's request for a continuance.

The Jefferson Circuit Court entered a judgment in respondent's favor on September 11, 1975, and respondent's counsel promptly mailed a copy to complainant. One week later complainant was informed by respondent's counsel that motions were going to be made to alter or set aside the judgment. Finally, on March 1, 1976, counsel for respondent confirmed by letter a telephone conversation he had with the Office of the Director, wherein he stated that an agreed settlement order had been entered in the civil litigation and that complainant would probably return the present disciplinary case to the Louisville Bar Association for further consideration. On the same day, by authority of the Inquiry Tribunal, complainant requested the Louisville Bar Association's Committee on Professional Responsibility to investigate all matters pertaining to the propriety of respondent's conduct. Said committee filed its report with complainant on June 4, 1976, and a second letter of notice dated June 10, 1976, was mailed to respondent pursuant to former RAP 3.160 which contained each and every factual allegation of professional misconduct against respondent.

Respondent filed a response to the complaint on June 24, 1976, and on September 27, 1976, the Inquiry Tribunal filed a charge consisting of seven separate counts alleging that respondent had engaged in unprofessional and unethical conduct calculated to bring the bench and bar of Kentucky

into disrepute. An answer to the charge was timely filed by respondent on October 7, 1976. A trial committee was appointed and a hearing held on March 11, 1977. During the course of this hearing, respondent's claim that his right to due process had been violated was discussed and the trial committee requested that the parties furnish it with briefs on this procedural issue.

Complainant and respondent subsequently filed briefs with the trial committee and respondent moved the committee to dismiss the charge on the ground that he had been denied due process either because a complaint had never actually been filed with the Kentucky Bar Association or in the alternative, if a complaint had actually been filed respondent was not furnished with a copy. The trial committee, by a vote of 2 to 1, recommended to the Board of Governors that the charge be dismissed for failure by complainant to comply with former RCA 3.130, thereby, violating respondent's right under the federal and state constitutions to due process and equal protection. It is significant to note that the trial committee expressly acknowledged that complainant had in fact received a complaint *prior* to sending notice to respondent by letter dated August 15, 1973.

On July 16, 1977, the Board of Governors entered an order referring the matter back to the trial committee for a decision on the merits and a second hearing was held before the committee on August 30, 1977. The trial committee filed its findings of fact on January 2, 1978, and recommended that the charge against respondent be dismissed. On March 18, 1978, the Board of Governors, by a vote of 10 to 1, found respondent guilty as charged of Counts IV through VII of the charge and recommended to this Court that respondent be suspended from the practice of law for a period of two years. The Board of Governors has filed an opinion in the record setting forth its findings of fact and recommendation.

On June 30, 1978, counsel for respondent filed a notice for review and brief on behalf of respondent pursuant to SCR 3.370(6). Complainant respectfully submits this brief in reply.

ARGUMENT

I

Complainant Emphatically Denies That Respondent's Right to Due Process of Law Has Been Abridged Either Through Lack of Proper Notice or Undue Delay in Investigating and Processing Respondent's Case.

Respondent raises two arguments concerning alleged procedural defects in the processing of the present case. First, respondent contends that complainant violated the provisions of former RCA 3.160(a) thereby denying respondent his right to due process of law on the ground that a complaint was never filed with the Kentucky Bar Association. In the alternative, respondent contends that if a complaint was actually filed with the Kentucky Bar Association, respondent was entitled to receive a copy under RCA 3.160(a) in order to formulate an adequate response. Respondent further asserts that he has been misled and "trapped" by complainant because he cooperated in furnishing information after he had received notice of the complaint.

Complainant is offended by respondent's spurious accusation that the Director and the staff of the Kentucky Bar Association somehow conspired to manufacture a complaint against respondent in order to "trap" him. This Court is well aware of the relatively massive number of complaints which are filed with the Director each year. The Director and his assistants have neither the time nor the inclination to create complaints out of thin air. Respondent's attack on the honor and integrity of the Kentucky Bar

Association cannot obscure the fact that respondent engaged in serious and impermissible breaches of ethical conduct.

Respondent bluntly infers that an actual complaint was never filed with the Kentucky Bar Association and does not exist because respondent was never furnished with a copy. It has been the unwaivering position of complainants that respondent had absolutely no right whatsoever to a copy of the actual complaint under the Rules of the Supreme Court of Kentucky or the due process clauses of the federal and state constitutions. Former RCA 3.160 which was captioned "Initiation of Disciplinary Cases" provided:

> Any complaint against an attorney for unprofessional conduct shall be filed with the Director who shall promptly *notify the attorney* by certified mail *of the complaint* and inform him that he has fifteen days to *acknowledge receipt of the complaint or respond to the merits.* (Emphasis supplied).

FIRST AND SECOND PARAGRAPHS OF PAGE 3, RESPONSE TO PETITION FOR REHEARING BY KENTUCKY BAR ASSOCIATION

Respondent filed a response to the complaint on June 24, 1976, and on September 27, 1976, the Inquiry Tribunal filed a charge consisting of seven separate counts alleging that respondent had engaged in unprofessional and unethical conduct calculated to bring the bench and bar of Kentucky into disrepute. An answer to the charge was timely filed by respondent on October 7, 1976. A trial committee was appointed and a hearing held on March 11, 1977. During the course of this hearing, respondent's claim that his right to due process had been violated was discussed and the trial committee requested that the parties furnish it with briefs on this procedural issue.

Complainant and respondent subsequently filed briefs with the trial committee and respondent moved the committee to dismiss the charge on the ground that he had been denied due process either because a complaint had never actually been filed with the Kentucky Bar Association or in the alternative, if a complaint had actually been filed respondent was not furnished with a copy. The trial committee, by a vote of 2 to 1, recommended to the Board of Governors that the charge be dismissed for failure by complainant to comply with former RCA 3.130, thereby violating respondent's right under the federal and state constitutions to due process and equal protection. It is significant to note that the trial committee expressly acknowledged that complainant had in fact received a complaint *prior* to sending notice to respondent by letter dated August 15, 1973.

PAGES 98, 99 AND 100, TRANSCRIPT OF TESTIMONY BEFORE TRIAL COMMITTEE, MARCH 10, 1977

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Mr. Savage: Now, I keep coming back to this, gentlemen, but for the purpose of deciding factually what has happened, I understand it's Mr. Triplett's position that, under Rule 3.6, no complaint was filed against this Respondent with the Director, and that stands unrefuted by the Bar Association?

Mr. Damron: Let me say this. The letter of notice that was issued to Mr. Heavrin by Mr. Whitmer

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is both a letter of complaint, or the complaint as well as the notice. That's our position.

Mr. Famularo: That was based upon the letter that Mr. Whitmer has received, as I understand, bringing up the whole allegation at the outset.

Mr. Rogers: Was a copy of this letter attached to that, or did the Bar act on its own without attaching anything to it?

Mr. Damron: The Bar acted on its own investigation and sent a report of its investigation to Mr. Heavrin, which is contained in the same letter. It did not attach any other letter from any other source.

Mr. Fox: I would ask that you might go into what constitutes a complaint.

Mr. Rogers: I think that is part of it.

Mr. Savage: And the Trial Committee Rule, and it very plainly says any complaint against an attorney shall be filed with the Director, who shall promptly notify the attorney. And in my mind, I'm trying, not trying to prejudge the issue. I'm going to read your briefs. The complaint is filed with the Bar Association and notice, not any complaint, but notice is given to the attorney.

Mr. Triplett: Again, our problem, Mr. Savage, is, in making an appropriate response, we need to see

some complaint and know what's in the complaint. Otherwise, we cannot refute it.

Mr. Rogers: Well, you can put that in your brief.

PAGES 1, 2, 3, 4 OF KENTUCKY BAR ASSOCIATION'S RESPONSE TO NOTICE FOR REVIEW

SUPREME COURT OF KENTUCKY

No. 78-SC-278-KB

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

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accurately and fully informed respondent in detail of all the factual allegations of misconduct which were contained in the actual documents.

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respondent had engaged in unprofessional and unethical conduct calculated to bring the bench and bar of Kentucky into disrepute. An answer to the charge was timely filed by respondent on October 7, 1976. A trial committee was appointed and a hearing held on March 11, 1977. During the course of this hearing, respondent's claim that his right to due process had been violated was discussed and the trial committee requested that the parties furnish it with briefs on this procedural issue.

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of law for a period of two years. The Board of Governors has filed an opinion in the record setting forth its findings of fact and recommendation.

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ARGUMENT

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(LETTERHEAD OF HOGAN, TAYLOR, DENZER & BENNETT)

June 21, 1976

Leslie G. Whitmer, Esq.
Kentucky Bar Association
315 West Main Street
Frankfort, KY 40601

RE: Donald M. Heavrin

Dear Mr. Whitmer:

Please treat the original and enclosures as a response to yours of June 10, 1976, addressed to Mr. Donald Heavrin. Mr. Heavrin responds as follows:

1. We question the procedure asserted in your letter of June 10, 1976, as we find no provision in the rules for the commencement of disciplinary procedure absent the filing of a sworn complaint. If indeed a complaint has been filed by the Kentucky Bar Association, please forward true copies of the minutes and resolutions authorizing the complaint and such supporting data as may be contained therein.

2. Your correspondence of June 10, 1976, fails to state or even claim that Mr. Heavrin is engaged in any improper, unprofessional or unethical conduct.

3. The facts stated in your letter of June 10, 1976, do not state a claim or states facts amounting to improper, unprofessional or unethical conduct.

4. As the Kentucky Bar Association has heretofore been advised, this entire transaction was the subject of certain litigation styled: Citizens Fidelity Bank & Trust Company v. Donald Heavrin, et al CR #174698, Jefferson Circuit Court, Chancery Branch, Second Division, and the matter was ultimately decided by the Honorable James Hubbs, presiding judge of such court. Heretofore, you have been supplied with Judge Hubbs' findings of fact, conclusions of law, and ultimate disposition of the case. During

the course of this trial, Mr. Heavrin testified in chief and also testified by deposition before the trial. Evidence was offered by Mr. Heavrin relative to the transaction with Mr. Bodenbender, relative to his statements to Ms. Maurine Collie and the two checks mentioned in the second paragraph of the second page of your letter dated June 10, 1976. The inferences to be drawn from these transactions were exhaustively argued before Judge Hubbs. After considering the transcript of evidence, numerous exhibits and having set aside all afternoon for oral argument in addition to briefs, Judge Hubbs rendered an opinion exonerating Mr. Heavrin from any wrongdoing. We adopt by reference to as if fully set forth herein all of the evidence offered by Mr. Heavrin, the entire transcript of evidence and, of course, the findings of fact and judgment of the court. After the judgment became final the Citizens Fidelity Bank and Trust Company undertook an appeal to Kentucky's highest court. Mr. Heavrin filed a cross-appeal. Thereafter, Citizens Fidelity and Mr. Heavrin reconciled their differences and the appeals were not perfected.

5. You will also remember that at all stages of the proceedings we have offered to make Mr. Heavrin's entire file available to you and this included material which would ordinarily be privileged and which I could not reveal without Mr. Heavrin's express consent. Neither you nor any member of your staff nor any member of the State or Louisville Bar contacted Mr. Heavrin or me relative to this information.

6. The judgment and finding of the Jefferson Circuit Court having considered all of the items alleged in your letter of June 10, 1976, as we stated exonerated Mr. Heavrin from any wrongdoing, it is our feeling that this judgment is res judicata and that the Kentucky Bar Association is bound by these facts and judgment. We also think the Kentucky Bar Association is estopped from proceeding because

all of the evidence which you allude has been in the record of the Jefferson Circuit Court proceedings for many months after the case was decided. We promptly advised you of this disposition.

7. To our knowledge Mr. Bodenbender has not complained of any improper conduct on the part of Mr. Heavrin. If we are incorrect about this, perhaps you would forward us any statement you have from Mr. Bodenbender which supports any claim of unprofessional conduct or impropriety. The issue of what Mr. Heavrin said to Ms. Collie was squarely before Judge Hubbs. It is quite understandable why Judge Hubbs would rule in Mr. Heavrin's favor when you consider the testimony of Citizens' vice president, Mr. Dan Ulmer. His testimony given under oath by deposition should be compared to the testimony that he gave at trial. There, of course, was a motive for Ms. Collie's testimony and it was, of course, to protect her own position.

8. We hope that you have transmitted the data we have heretofore sent you to the Inquiry Tribunal and this, of course, includes Judge Hubbs' opinion and the transcript of evidence. It would be grossly unfair to Mr. Heavrin if the Inquiry Tribunal did not have the benefit of these documents particularly when we have offered to make them available for such copying or use as you desired. If this has not been done, then the Injury Tribunal would only have a very sketchy picture of this case. We would like to be advised as to whether or not this has been done.

9. It is categorically denied that Mr. Heavrin at any time or at any place mentioned in your letter of June 10, 1976, or in your letter of August 15, 1973, engaged in improper, unprofessional or unethical conduct.

We again enclose copies of the findings of fact, conclusions of law, and opinion rendered by Judge Hubbs on September 12, 1975. We of course, make this response in triplicate, and we, of course, would like to be advised of any

action. Any other charge previously made or incorporated in the present charge is denied. This includes the statement made in your letter of August 15, 1973. We would like to refer you to page two of your letter of August 15, 1973, where you make the statement that the clients named on the checks have never received their funds. We assume that you mean the clients named on the $105,000 check and not the checks enumerated on page 2. Relative to the letter of August 15, 1973, we adopt the statements made in this correspondence as a defense to the charges contained in the letter of August 15, 1973.

We are mindful that the Inquiry Tribunal sustained our motion to defer action pending the outcome of the litigation described herein, and we are, of course, grateful for the action. This does not change our position that no improper conduct is present here.

Very truly yours,
(s) Henry A. Triplett

HAT:tlb
Enclosure

(KENTUCKY LAW SUMMARY, 2/7/79)
SUPREME COURT
Opinions Rendered, February 6, 1979

ATTORNEYS

Public Reprimand—

Ky. Bar Assn. v. *Burroughs;* In Supreme Court; Opinion and Order.

"The following decision of the Board of Governors of the Kentucky Bar Association is hereby adopted pursuant to and in conformity with SCR 3.370 (8):

'FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND ORDER OF THE BOARD OF GOVERNORS OF THE KENTUCKY BAR ASSOCIATION

'On or about December 19, 1977, the respondent, Clinton R. Burroughs, was charged with unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute, specific charges being summarized as follows:

I. Respondent entered a trust agreement with a client whereby the managed the client's funds, and failed to give an accounting.

II. Respondent commingled his personal funds with the client's funds.

III. Respondent breached his fiduciary duty to this client.

IV. Respondent misappropriated $1,651.30 of his client's funds.

'The charge was served by registered mail on December 22, 1977. Respondent filed his response on January 10, 1978. And a Trial Commissioner was appointed, conducted a hearing, and filed his report. The Report made numerous findings, but no recommendation as to guilt or innocence. The matter was considered by the Board of Governors of the Kentucky Bar Association, which makes the following Findings of Fact, Conclusions of Law, and Order.

'FINDINGS OF FACT

'The Board of Governors finds facts as follows:

'1. Respondent had represented Eugene N. Turner on various, petty matters, many of them being in Louisville Police Court, and arising from Turner's consumption of alcohol. Sometime in 1975, Turner received $20,500.00 in settlement of a claim for wrongful death of his father. Fearing that he may squander the money, Turner asked Respondent to hold $17,000.00 as Trustee, and to that end a Trust Agreement was executed. The agreement provided for investment of the corpus and invasion of corpus for Turner's

benefit in the respondent's discretion. The Agreement was revocable by Turner. It contained no provision for an accounting, but Turner and Respondent agreed orally that Respondent would account in writing as of December 31 of each year.

'2. Respondent deposited $17,000.00 as Trustee in a passbook savings account. Thereafter, Turner began a series of demand on Respondent, and Respondent disbursed funds as follows: (1) directly to Turner; (2) to one Wanda Turner, pursuant to Turner's oral authorization; and (3) to Turner's creditors.

'3. Disbursements to and for Turner were made through an account entitled "Clinton R. Burroughs, Attorney". This was Respondent's business account, through which his law practice revenue and expenses passed. Repondent would withdraw money from the Trusteed savings account, deposit it in the "attorney" account, and write checks on the attorney account for and on behalf of Turner. The transfer of funds from the savings account to the attorney account did not coincide with the checks written to and for Turner. At times, the total of the checks written to and for Turner exceeded the transfers from the savings; at times they were less than the transfer from savings. From this, the Board finds no intent to misuse the funds.

'Respondent did not consider the money in the attorney account to be his own (although he legally had title to it) until he transferred it to another "personal account". The Board finds that Respondent did not understand the workings of a trustee account for clients' money; that Respondent commingled personal funds and clients' funds, but did so with no intent to defraud.

'4. On one occasion Respondent loaned $1,651.30 of Turner's money to a client, with which to purchase a truck. Although good business precautions were not taken in respect to perfection of a security interest, the loan was repaid with interest, and the Trust Fund profited thereby. Respondent told Turner that the disbursement was to purchase a car for Wanda, which it was not. The check had been written to a car dealer. The Inquiry Tribunal found, and the Board has no reason to doubt, that Respondent forgot why he had written the check and when asked, erroneously thought that he had purchased a car for Wanda.

'5. On one occasion Respondent noted on Trust account records an investment of $3,500.00 in "XYZ Corporation". It later developed that XYZ Corporation was, in fact, Computerland, Inc.; that Respondent has shied from the investment and never withdrawn any money from the savings account for it. No explanation was given for using the fictitious name "XYZ Corporation", or for entering the investment on the Trustee account records; however, this was no misappropriation or imprudent investment. It was no investment at all.

'6. No accounting was rendered in 1975 because the number of transactions in 1975 was insignificant. In January, 1977, Respondent gave Turner an accounting for 1975 and 1976, which is accurate except for a $100.00 mistake in subtraction, and except that Respondent did not credit himself with cash payments totaling $498.98 he had made on Turner's behalf.

'7. On May 17, 1977, respondent gave Turner a check for $1000.00 marked "Final Draw". Turner knew that more money should be in the account. Ultimately, a corrected accounting was made, and $3,233.40 remained in Trust. Turner received $1,616.70 as a final distribution, and Respondent took $1,616.70 as a fee for services rendered. No complaint is made that Respondent's fee was excessive. Although the record is not clear, one gathers that Respondent's fee included charges for various legal representations as well as handling the Trust.

'CONCLUSIONS OF LAW

'The Board makes Conclusions of Law as follow:

1. Respondent did not fail to give an accounting.

2. Respondent commingled his funds and his client's funds.

3. Respondent breached no fiduciary duty to his client.

4. Respondent misappropriated no money of his client to his own use.

5. Respondent is guilty of unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute.

'DISCUSSION OF PUNISHMENT

'A majority of nine found no intention to defraud on the part of Burroughs. They considered him to be misguided, and were concerned that he did not know the mechanics of a Trustee Account. They were impressed by the exasperating nature of handling Turner's affairs. Therefore, they considered a public reprimand to be appropriate.

'Other members of the Board of Governors considered Respondent's conduct to warrant greater punishment. Particularly, they believed that the final accounting had to be dragged out of him, and there was some belief that he would have kept the final $3,200.00 if he had not been confronted.

(LETTERHEAD OF HOGAN, TAYLOR, DENZER & BENNETT)

September 12, 1975

Mr. Leslie G. Whitmer, Director
Kentucky Bar Association
Frankfort, Kentucky 40601

RE: Donald M. Heavrin

Dear Mr. Whitmer:

By letter dated September 5, 1973, you advised that the Inquiry of Tribunal agreed to defer action on the complaint

pending a determination by the Circuit Court in the lawsuit against Donald Heavrin involving substantially the same fact situation as the one presently before the Tribunal.

You requested that we advise you when judgment was re-entered. In this morning's mail we received copies of the enclosed findings fact and conclusions of law and opinion. You will note the following language. "Heavrin had nothing to do with the forgery and there was no conspiracy."

We are of the opinion that these findings completely vindicate Mr. Heavrin from any claim of unprofessional performance.

We would appreciate it if you would advise the Inquiry Tribunal of these findings and transmit copies to them. We will then request that the complaint initiated by your office against Mr. Heavrin be dismissed.

We will tender a final judgment in this case in the near future. Mr. Heavrin has authorized me to tell you that he will satisfy the $11,000.00 judgment. This last statement must be qualified to the extent that in the event Citizens Fidelity Bank and Trust Company takes an appeal, Mr. Heavrin of course will cross appeal.

We would appreciate acknowledgment that you have received this correspondence and the enclosures. Thank you for your courtesy in the premises.

Sincerely,

Henry A. Triplett

HAT:mkb
Enclosures
bcc: Mr. Don Heavrin

SUPREME COURT OF KENTUCKY

October 7, 1976

KENTUCKY BAR ASSOCIATION - - - *Complainant*

v.

DONALD M. HEAVRIN - - - - - *Respondent*

ANSWER

The respondent, Donald M. Heavrin, for his answer to the charge filed against him by the complainant and without waiving his right to file additional pleadings and motions, says:

(1) That the procedure employed by the complainant violates the respondent's rights guaranteed to him by the Fourteenth Amendment to the Constitution of the United States in that he is denied due process of law and equal protection of the law because he does not have a trial before the Board of Governors or the Supreme Court of Kentucky and is not permitted to confront the witnesses against him before either the Board of Governors or the Supreme Court of Kentucky. He is denied equal protection of the law because there are no objective standards in determining guilt or punishment. The procedure invoked by the complainant also is in violation of Section 2 of the Bill of Rights of the Constitution of Kentucky because it permits arbitrary action. His fundamental right to counsel is also violated because neither he nor his counsel may appear before the Board of Governors and it is, of course, discretionary whether or not the Supreme Court of Kentucky will permit oral arguments should the case reach such court. Further

answer to the charge is made without waiving the contentions made in this paragraph.

(2) The charge fails to state sufficient facts or a sufficient claim which would warrant or justify disciplining the respondent.

(3) That all averments not expressly admitted are denied.

(4) That heretofore the subject matter of the charges asserted herein against the respondent were the subject of a certain action filed in the Jefferson Circuit Court, CR 174698. It was an action filed by Citizens Fidelity Bank and Trust Company against Donald M. Heavrin and others. The subject matter of this action involved the check attached to the charge marked "Exhibit A." That the defendant, Donald M. Heavrin, in this action, and the respondent herein are one and the same. That the action was allotted to the Chancery Branch, Second Division, presided over at all times material herein by the Hon. James Hubbs. That numerous depositions were taken and Judge Hubbs presided over a protracted trial. Thereafter, Judge Hubbs heard approximately two hours of oral argument by counsel for the respective parties. Thereafter, Judge Hubbs made certain findings of fact and conclusions of law relative to the claims against Heavrin, entered a judgment pursuant thereto, and overruled motions to vacate and alter. That the judgment entered by the court is final and unappealable. Judge Hubbs found, inter alia, that Mr. Heavrin had nothing to do with the forgery and was involved in no conspiracy. Attached hereto and made a part hereof as if fully copied herein is a true copy of the Findings of Fact and Conclusions of Law of Judge Hubbs opinion marked "Respondent's Exhibit 1." Accordingly, the respondent affirmatively pleads res judicata and estoppel by judgment. That before the formal charge was filed herein, respondent authorized his counsel to make available to the complainant his entire

file, and complainant through its authorized agent came to the office of respondent's counsel and studies the file for approximately 3½ hours but did not copy either the Transcript of Evidence or any of the material findings made by Judge Hubbs. Heretofore counsel for respondent had forwarded to the office of the Director of the Kentucky Bar Association copy of respondent's Exhibit 1.

(5) That at all times material herein, the respondent, Donald M. Heavrin, was acting in his capacity as a duly licensed and regularly practicing attorney within the Commonwealth of Kentucky and as such represented and is now representing James F. Donoghoe, a former member of the Kentucky Bar Association who has been permanently disbarred by order of the Court of Appeals of Kentucky. That there were civil claims and criminal charges being asserted against James F. Donoghoe and the respondent represented James F. Donoghoe ethically, faithfully, and to the best of his ability, and is now so doing. That respondent has every right and duty to vigorously and adequately represent his client as all lawyers do whether their clients are famous or obscure, innocent or guilty, rich or poor, popular or unpopular, good people or bad people, and it is immaterial for lawyer's clients' conduct to be the subject of wide notoriety and the conduct does not have public approbation.

(6) That respondent unequivocally and categorically denies any unethical or improper conduct on his part as claimed by the charge herein and further states that some of the statements contained in the charge have been conclusively refuted by the Findings of Fact, Conclusions of Law, and Opinion by Judge Hubbs.

(7) That for answers to paragraph 1 of the charge, respondent admits the first three sentences of paragraph 1 and denies the last sentence.

(8) For answer to paragraph 2 of the charge, respondent admits the first sentence of paragraph 2, denies the

second sentence, admits the third sentence, and admits the last sentence.

(9) For answer to paragraph 3 of the charge, respondent denies the averments contained therein and further says such averments violate Rule 11 of the Kentucky Rules of Civil Procedure which requires averments and allegations to be made in good faith and that the person making them have some legal or lawful basis to support them.

(10) For answer to paragraph 4 of the charge, respondent admits the first three sentences of paragraph 4, denies the fourth sentence, and admits the last sentence with the qualification that is is not clear as to whether or not the Florida attorney's signature was forged.

(11) For answer to paragraph 5 of the charge, respondent admits that he received $11,000 in cash from Citizens Fidelity Bank and Trust Company which he handed to Mr. Donoghoe. He admits the second sentence of paragraph 5, admits the third sentence, denies so much of the fourth sentence which avers that he commingled said funds with his own, and admits the last sentence of paragraph 5.

(12) For answer to paragraph 6 of the charge, respondent admits the first sentence, admits the second sentence, and categorically denies the last sentence of paragraph 6.

(13) For answer to paragraph 7 of the charge, respondent admits the first sentence therein, denies the second sentence, denies the third sentence, and admits the last sentence. That the simple answer to this averment is that if Mr. Donoghoe's check would have been good, Mr. Heavrin's check would have been good. That this transaction was testified about in great detail in the aforementioned Jefferson Circuit Court trial.

(14) That heretofore and by letter dated June 10, 1976, the Kentucky Bar Association, complainant herein, wrote Mr. Heavrin and advised him that a formal complaint had been made and he responded to this by letter dated June 21,

1976, and such response is attached hereto and made a part herein marked "Respondent's Exhibit 2."

WHEREFORE, the respondent, Donald M. Heavrin, demands:

(1) That the charge filed by the complainant herein be dismissed.

(2) That he recover all other and proper relief in the premises as the circumstances warrant and justify.

HOGAN, TAYLOR, DENZER & BENNETT
HENRY A. TRIPLETT

Attorney for Respondent

PAGES 13, 16, 17, 19, 20, 28, 32 AND 47 OF HEAVRIN'S TESTIMONY BEFORE TRIAL COMMITTEE AUGUST 30, 1977

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I told Donoghoe, at the beginning, and I said so in the deposition and I said so at the trial, I told him, at the outset, that I didn't care who was right or wrong in the fight with the people in Pennsylvania; that I was not interested in representing him, unless he made those people whole, and that's the arrangement I had, from the first day that I ever got into the case—"I don't want to argue with the people in Pennsylvania. I want those people paid." And he said, "Fine. We'll pay them, as I make the money on these other deals."

16

Well, I said in the deposition that, anytime I've ever represented anyone in a criminal case, you always have some suspicions, and I've been suspicious of people that told me the absolute truth and I've felt very confident about people that were lying to me. I had no more suspicion about him than I would someone who walked in this afternoon and told me their version of a criminal case.

17

I don't know. See, the thing that was foremost in my mind is that I told him—suppose I thought that he was 100 percent right or 100 per cent wrong; that was totally irrelevant, because I told him that I wouldn't represent him, unless he made the people whole in Pennsylvania, and he protested about that, saying that they were breaching their agreement; that he had a specified period of time in which to pay them money and he had agreed to pay them funds, as they needed them for the day-to-day expenses, and so on. I said, "I don't care what the deal is with the people of Pennsylvania, whether you think they breached the deal or not; pay the people."

19

Then, on Monday, when the bank called me, they said, "There's a question about this endorsement." Now, these banks are shuffling everybody around, but no one has ever said anything about questions about endorsements. So, I got on the phone and I called him on the phone, and I was irate, and I was very angry, and I probably said something like, "You no good son-of-a-bitch. The bank just called me and said there's a question about this endorsement." And he said, "Give them the names of the people in Whitesville, so that they can confirm the fact that they've endorsed these checks." I put the guy in an airplane, to go there, from Kentucky Flying Service, to get the endorsements, and I said, "Jim, I've already told Dan Ulmer at the bank where he can contact these people.

20

He said, "Fine. Let them make any kind of check they want." Then, later in the day, as I testified, I called him back to give him the name of the lawyer in Florida that was also on the check and, when I called back, Ulmer's secretary said that the bank had checked the endorsements on the check and everything was perfectly all right, and then I asked her to have him call me and tell me that, because I

wanted him to tell me that everything was all right, and, at one-thirty that afternoon, the vice-president of the bank personally called me and said, "We have checked everything. The endorsements are A-Okay. We'll honor checks on that account." And I said, "Fine." And I called Donoghoe and I apologized. I said, "I'm sorry. The bank has checked everything. The endorsements are 100 percent. You can now get the money, write a check on the account and send it to the people in Whitesville." He said, "I knew everything was okay." And, you know, he was sort of laughing about my getting onto him earlier in the morning.

28

Yes, he told me he took all of his accident cases on a 50-50 basis. I was somewhat amazed by it too, because I've never taken one for higher than a third, 33⅓, but this case also had other checks in it. In other words, the settlement came in piecemeal because—I don't know—I think it was Lloyds of London, or somebody, who pays off because they have a congloremate of insurance companies that they draw on, and the money came in piecemeal, and this was not the only check in this case. This case totaled 185 thousand, or something like that, and the money was brought in in several different checks.

32

No sir. Now, I relied on his word because I thought he was telling me the truth. But, on Monday, when—no one ever said, "There's a question about these endorsements." On Monday, when they said, "There's a question about these endorsements," the bank still had all of the money except for the 11 thousand dollars, and I went down the list and told Ulmer where he could contact those people. He finally, grudgingly, admitted that on cross examination and I did everything I could, so that he could make an independent check. I don't know what else I could have done to protect the payees. Then, after the bank has, what I presumed,

called all the payees and asked them about it and they said, "Yes, everything is fine," he called me back and said, "We have personally checked." So, not only did I rely on him and believe that he was telling me the truth, Monday, while the funds were still being held by the bank, the bank conducted an investigation and I gave them as full cooperation as I could possibly give them. I don't understand what else I could do. I mean, you know, there may be something else I could have done, but I don't know what it was.

47

I know that the check, which was ultimately cashed on, I think, the 19th or sometime, was issued the 6th of June and I know that Donoghoe went various places to get the endorsements. I know that he went—I don't know—I know that we got an airplane and put him on it to go to Whitesburg, because there's no commercial flights there, and I know that he went to Florida with the check, because, after they got the check, the reason the people in Whitesburg were pressuring him was because he was having difficulty getting all these parties' signatures on the check. He had to go various places to get that done.

Supreme Court, U. S.
FILED
APR 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1497

DONALD M. HEAVRIN - - - - Petitioner

VERSUS

KENTUCKY BAR ASSOCIATION - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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April 20, 1979.

ROBERTS PRINTING CO., FRANKFORT, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1497

DONALD M. HEAVRIN - - - - Petitioner

VERSUS

KENTUCKY BAR ASSOCIATION - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Opinion of the Supreme Court of Kentucky (Appendix to Petition, pp. 1-11) is reported in 573 S.W. 2d (Ky. 1978).

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the disciplinary proceedings of the Ken-

tucky Bar Association and the Supreme Court of Kentucky were conducted in such a way as to deny the petitioner procedural due process of law and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

2. Whether the evidence supports the findings and judgment of the Supreme Court of Kentucky.

RULES INVOLVED

RULES OF SUPREME COURT OF KENTUCKY (SCR) CONCERNING PROCEDURES IN DISCIPLINARY CASES (Before January 1, 1978 Amendments)

3.130 ABA Code of Professional Responsibility Recognized as Authority.

The Court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standard of Professional conduct required of members of the bar, and the Board may cause to be tried all charges brought under this code as well as charges for other unprofessional or unethical conduct calculated to bring the bench and bar into disrepute.

3.160 Initiation of Disciplinary Cases.

(a) Any complaint against an attorney for unprofessional conduct shall be filed with the Director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge receipt of the complaint or respond to the merits.

(b) Neither the Kentucky Bar Association nor any member thereof shall be liable to any member of the Bar nor to any other person charged or investigated by said Association or its officers for any damages incident to such investigation or any complaint, charge, prosecution, proceeding or trial.

3.190 Charges; Form; by Whom and Where Filed.

If the Tribunal determines, by a majority vote, that a charge should be filed, it shall prepare such charge stating the name and present, or last known, address of the attorney and facts alleged to constitute unprofessional conduct. The charge shall be signed by a member of the Tribunal and filed in the office of the Director.

3.300 Rights of Respondent Against Whom a Charge has been Filed.

The respondent against whom a charge has been filed shall have the right to be represented by counsel and entitled to a hearing before a Trial Committee. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Committee. He shall be afforded a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

. . . . Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Constitution, Section 116 (Enacted 1974, effective January 1, 1976):

. . . . The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.

KENTUCKY REVISED STATUTES

30.170 Court rules governing practice of law and state Bar

(1) The Court of Appeals (now called Supreme Court of Kentucky) shall adopt and promulgate rules:

(a) Defining the practice of law;

(b) Prescribing a code of ethics governing the professional conduct of attorneys and the practice of law;

(c) Establishing practice and procedure for disciplining, suspending and disbarring attorneys;

(d) Organizing and governing a bar association of the attorneys of the state to act as an administrative agency of the Court of Appeals for the purpose of enforcing such rules as are adopted and promulgated by the court under this section; providing for the government of the state bar as a part of the judicial department of state government, and for such divisions thereof as the Court of Appeals determines; requiring all persons practicing law in this state to be members in good standing of the state bar; and fixing the form or its organization and operation;

(e) Fixing fees upon recommendation of the board of bar commissioners to be paid for the purpose of administering this section and the rules adopted and promulgated under it, and for the collection and disbursement of such fees.

(2) The rules of court adopted and promulgated under this section shall supersede all laws or part of law in conflict therewith, to the extent of the conflict.

(3) No rule adopted and promulgated under this section shall prevent a person not holding himself out as a practicing attorney from writing a deed, mortgage or will, or prevent a person from drawing any instrument to which he is a party.

(Repealed June 19, 1976)

21A.150 Powers of Kentucky Bar Association in disciplinary proceedings

As deemed necessary in the exercise of its power to discipline attorneys, as granted by section 116 of the Constitution, the Supreme Court may authorize the Kentucky Bar Association to conduct hearings, administer necessary oaths, take testimony under oath, compel the attendance of witnesses, and compel the production of records and other evidence.

(Effective June 19, 1976)

21A.160 Organization and control of state Bar vested in Supreme Court

The Supreme Court has power to provide for the organization, government and membership of the state Bar of Kentucky and to adopt rules and regulations to govern conduct and activity of the state Bar and its members.

(Effective June 19, 1976)

STATEMENT OF THE CASE

On or about August 14, 1973, an attorney filed a letter in the Office of the Director of the Kentucky Bar Association (respondent herein) raising allegations that Donald M. Heavrin (petitioner herein) had engaged in unethical and unprofessional conduct with respect to the extraordinary circumstances surrounding the cashing and distribution of the proceeds of a check in the amount of $105,000. The letter was supported by photostatic copies of three sworn affidavits of persons stating their true signatures did not appear on the

checks (forgeries were present). The Director mailed a confidential letter dated August 14, 1973, to petitioner by certified mail pursuant to SCR 3.160 formally notifying petitioner that a complaint was being made against him. The Director's letter of notice did not contain copies of the actual documents that had been filed with the Director. However, the letter of notification accurately and fully informed petitioner in detail of all the factual allegations of misconduct which were contained in the actual documents. *Only these factual allegations became allegations in a later disciplinary charge together with allegations contained in a later letter of notice dated June* 10, 1976.

By letter dated August 16, 1973, petitioner's counsel replied to the Director's letter of notice and formally requested that proceedings before the Kentucky Bar Association be held in abeyance pending the outcome of litigation in the Jefferson Circuit Court styled *Citizens Fidelity Bank and Trust Company v. Donald M. Heavrin, et al.*, Civil Action No. 174698. On September 5, 1973, the Inquiry Tribunal granted petitioner's request for a continuance.

The Jefferson Circuit Court entered a judgment on September 11, 1975, and petitioner's counsel promptly mailed a copy to respondent. One week later respondent was informed by petitioner's counsel that motions were going to be made to alter or set aside the judgment. Finally, on March 1, 1976, counsel for petitioner confirmed by letter a telephone conversation he had with the Office of the Director, wherein he stated that an agreed settlement order had been entered in the civil litigation and that respondent would probably return the present disciplinary case to the Louisville Bar Association's Committee on Professional Responsibility to investigate all matters pertaining to the propriety of petitioner's

conduct. Said committee filed its report with respondent on June 4, 1976, and a second letter of notice dated June 10, 1976 (Appendix to Response, p. A1-A2), was mailed to petitioner pursuant to SCR 3.160 which contained each and every factual allegation of professional misconduct against petitioner. The second letter of notice was sent for the purpose of placing petitioner on notice as required by SCR 3.160 of additional facts disclosed in the Louisville Bar Association's investigation which had not been known by respondent when the earlier letter of notice was sent on August 15, 1973. *Only these factual allegations became allegations in a later disciplinary charge together with those raised by the August* 15, 1973, *letter of notice.*

Petitioner filed a response to the complaint on June 24, 1976, and on September 27, 1976, the Inquiry Tribunal filed a charge consisting of seven separate counts alleging that petitioner had engaged in unprofessional and unethical conduct calculated to bring the bench and bar of Kentucky into disrepute. An answer to the charge was timely filed by petitioner on October 7, 1976. A trial committee was appointed and a hearing held on March 11 1977. *At no time during the hearing or subsequent proceedings were any factual allegations made by respondent that were not fully set forth in the two letters of notice described above.* During the course of this hearing, petitioner's claim that his right to due process had been violated was discussed and the trial committee requested that the parties furnish it with briefs on this procedural issue.

Respondent and petitioner subsequently filed briefs with the trial committee and petitioner moved the committee to dismiss the charge on the ground that he had been denied due process either because a complaint had never actually been filed with the Kentucky Bar Association or, in the alterna-

tive, if a complaint had actually been filed, respondent was not furnished with a copy. The trial committee, by a vote of 2 to 1, recommended to the Board of Governors that the charge be dismissed for failure by respondent to comply with SCR 3.160, thereby, violating petitioner's right under the federal and state constitutions to due process and equal protection. (Appendix to Response, pp A3-A6, dissenting opinion and Appendix to Petition, pp. 31-33). It is significant to note that the trial committee expressly acknowledged that respondent had in fact received a complaint *prior* to sending notice to petitioner by letter dated August 15, 1973. The dissent to the trial committee report clearly and correctly stated the Director was under no rule provision to furnish a copy of the actual complaint to petitioner.

On July 16, 1977, the Board of Governors entered an order referring the matter back to the trial committee for a decision on the merits and a second hearing was held before the committee on August 30, 1977. The trial committee filed its findings of fact on January 2, 1978, and recommended that the charge against petitioner be dismissed. On March 18, 1978, the Board of Governors, by a vote of 10 to 1, found petitioner guilty as charged of Counts IV through VII of the charge and recommended to the Supreme Court of Kentucky that petitioner be suspended from the practice of law for a period of two years. (Appendix to Response, p. A7-A8) The Board of Governors has filed an opinion in the record setting forth its findings of fact and recommendation.

On June 30, 1978, counsel for petitioner filed a notice for review and brief on behalf of petitioner. Respondent filed its brief in reply on July 31, 1978. On October 31, 1978, the Supreme Court of Kentucky rendered a per curiam opinion by five (5) justices adopting the decision of respondent's Board of Governors and suspending petitioner from the practice of law for two (2) years. The Chief Justice and an associate Justice dissented. A petition for rehearing was denied on January 3, 1979. The Supreme Court of Kentucky stayed the execution of the mandate to permit initiation of proceedings in this Court. This Court has further stayed the proceedings pending a ruling on the petition.

Respondent has, in detail, stated the procedural process through which petitioner's disciplinary case has proceeded to this point to show its compliance with Rule 3 of the Supreme Court of Kentucky in every respect.

Petitioner has stated in his statement of the case (Petition pp. 5-13) his view of facts leading to his suspension from the practice of law by the Supreme Court of Kentucky. While the present cause is not materially based on the conduct of petitioner's showing grave misconduct as a practicing lawyer, petitioner has argued in his petition "vague charges" and "the lack of standards"; therefore, it is necessary to call the Court's attention to the findings of the Board of Governors, Kentucky Bar Association adopted by the Supreme Court of Kentucky. (See Appendix to Petition, pp. 40-41). The factual findings of the Board of Governors as adopted by the Supreme Court of Kentucky, as fully set forth, are respectfully called to the Court's attention at this time. (See Appendix to Petition, pp. 2-7). Petitioner's view of the facts are not the findings of the Board of Governors and the Supreme Court of Kentucky.

ARGUMENT

The issues raised by the petitioner in his Petition for Writ of Certiorari concern the constitutionality of the procedures utilized by the Supreme Court of Kentucky in disciplining its officers.

Each issue raised by petitioner will be answered briefly after a short consideration of the general issues in the case.

I.

THE DECISION BELOW WAS BASED ON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND ..

The constitutional issues raised by petitioner in his petition for rehearing before the Supreme Court of Kentucky were whether or not the disciplinary proceedings by the Kentucky Bar Association and Supreme Court were conducted in such a way as to deny him rights of procedural due process and equal protection of the law under the Fourteenth Amendment of the United States Constitution. The Court in its per curiam opinion clearly based its decision on independent and substantial non-federal grounds.

Under the Rules of the Supreme Court of Kentucky and Kentucky case law, the findings of the trial committee and the Board of Governors were only advisory; and the court itself made an independent examination of the factual and legal issues involved and confirmed the Board's advisory findings. (Appendix to Petition pp. 1-11). The court itself was the only body which could impose any disciplinary action and there was no denial of procedural due process. All rules of the court were strictly followed at all stages of the proceeding.

The state court has clearly stated this position in *Kentucky Bar Association v. Stivers,* Ky., 475 S.W. 2d 900, cert. denied, 406 U.S. 968 (1972), stating, in part:

> "The report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual issues and of the final action to be taken; The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding." (p. 904)

> • • • •
>
> "But it must be recognized that its action is nothing more than advisory to this Court. So far as we are concerned, the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted."
>
> • • • •
>
> "In a matter as serious as this, the advisory weight of the Board's action can be little more than hortatory, which means in simple English, that the members of this Court are going to exercise their own judgment anyway." (p. 904)

It is equally clear that the court did exercise its own judgment by the fact that it refused to follow the recommendations of the trial committee concerning recommended discipline. The majority of the Court further exercised its own judgment in specifically reviewing the testimony of Maureen Collie, a bank employee, as given in *Citizens Federal Bank and Trust Company v. Donald M. Heavrin,* Jefferson Circuit Court Civil Action No. 174698 (1975). The court stated it believed Ms. Collie. (Appendix to Petition pp. 2 and 6). In fact, the dissenting opinion by Chief Justice John Palmore states, "This is a very critical point to me because if I were convinced that Heavrin did lie to Ms. Collie, I probably would concur in the majority opinion." (Appendix to Petition p. 13). Its majority judgment concerning factual issues agreed with the recommendations of the Board.

The constitutional issues raised by petitioner were answered by the court through the interpretation of Kentucky law and the Rules of the Supreme Court of Kentucky. The Court clearly cited the notice provision of SCR 3.160 (Appendix to Petition, p. 1). Its factual findings are based on the entire record and it stated the provisions of the Code of Professional Responsibility adopted by it which were violated. (Appendix to Petition pp. 2-10; SCR 3.130). The court did

not need to elaborate further in its concise and clear opinion. There were no federal issues to be decided since the sole basis on which to determine the validity of the petitioner's constitutional arguments rested on the proper interpretation of Kentucky law and standards of conduct set by the Kentucky court.

The facts in this case clearly show petitioner to be dishonest and unfit to practice law. The public must be protected from such a practitioner.

The petitioner has requested this Court to grant a Petition for Writ of Certiorari, and yet a close examination of the issues involved and a careful reading of the opinion rendered by the Supreme Court of Kentucky clearly reveals that the results reached in this case by the Supreme Court of Kentucky were based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Supreme Court of Kentucky and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Supreme Court of Kentucky and the sound standards of conduct applied to those facts by the court.

II.

THE DISCIPLINARY PROCEEDINGS OF THE KENTUCKY BAR ASSOCIATION AND THE SUPREME COURT OF KENTUCKY DID NOT DENY PETITIONER PROCEDURAL DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Petitioner states on page 14 of his petition that *In re Ruffalo*, 390 U.S. 544, 551 (1968), holds that state disciplinary proceedings are "of quasi-criminal nature." The *Ruffalo* case dealt with a federal disbarment proceeding. This Court had before it the state proceeding but denied the Petition for Writ of Certiorari. *Ruffalo v. Mahoning County Bar Association,*

Ohio, 199 N.E. 2d 396, cert. denied, 379 U.S. 931 (1964). While this Court has never, to respondent's knowledge, held that a state disciplinary proceeding lacks due process protections, it is certainly clear this case raises no important constitutional issue warranting review by this Court in setting a precedent to grant review of unified state bar disciplinary procedures on a procedural due process argument.

Indeed, the United States Court of Appeals for the Sixth Circuit reviewed the precise issues petitioner raises under Rule 3 of the Supreme Court of Kentucky (formerly Court of Appeals of Kentucky) and rejected due process arguments stating:

> (3, 4) There are, as appellants assert, some unusual features in the Kentucky procedure. The State Bar Board of Governors' review of a complaint (Step 2) is entirely *in camera* excluding the respondents who had been complained against. And the recommendations of the Trial Committee (Step 1) and those of the Board of Governors (Step 2) are entirely advisory. Kentucky's highest court has interpreted its rule as reserving to itself final decision as to both guilt and penalty after its review of the record made before the Trial Committee and the recommendations of the Trial Committee and the Board of Governors. ***Kentucky State Bar Association v. Stivers***, 475 S.W. 2d 900 (Ky. Ct. App. 1972). Part 3 of the Rules of the Kentucky Court of Appeals provides a full hearing on written charges, with rights of confrontation and counsel before the Trial Committee. There is no allegation that those rights were not made available to appellants. The Court of Appeals decisions were based upon the full written record made before the Trial Committee and after full hearing before the Court of Appeals itself. The panel of this court which decided the *Taylor* case was, we feel, eminently correct in rejecting federal due process attacks upon K.R.S. § 30.170

(1975) and Part 3 of the Rules of the Kentucky Court of Appeals. *Getty v. Reed*, 547 F. 2d 771, CA 6 (1977).

It is significant to note Chief Justice Warren E. Burger's comments on nationwide disciplinary efforts:

> "It is now five years since a committee of the American Bar Association, chaired by my distinguished colleague, Mr. Justice Clark, reported in essence that although we lawyers profess to regulate and discipline ourselves, by and large discipline of professional misconduct of lawyers is virtually non-existent in most of the fifty States. The American Bar Association is undertaking some steps to implement the Clark report, and in the past year or more there are encouraging signs of more progress than in the previous 25 years. That program demands more impetus and the moral support of the law school community, and of course the support of judges." Remarks of Chief Justice Warren E. Burger, Convocation for the Dedication, J. Reuben Clark, III Law School, Brigham Young University, Provo, Utah, September 5, 1975.

A. There is no Denial of Due Process Where A Lawyer is Not Given Any Opportunity for a Hearing Before the Board of Governors.

Petitioner readily admits he had a full due process hearing before a three-man trial committee, the chairman of which was designated and commissioned by the Chief Justice of the Supreme Court of Kentucky to try the issues in the proceeding.

In order for the Court to review the excellent due process procedures incorporated into Rule 3 of the Supreme Court of Kentucky, it is necessary to start at the beginning of the disciplinary process. In petitioner's case, a complaint was filed and investigated. Matters of severe unprofessional conduct were disclosed. Notice was given of the complaint and a timely response was filed. The Inquiry Tribunal, appointed by

the Chief Justice of the Supreme Court of Kentucky, reviewed the complaint and response and determined that probable cause existed to conclude that petitioner had been engaged in unprofessional conduct; therefore, a charge was filed. Petitioner received notice of the charge and a copy of the charge and filed a timely answer thereto. A full due process hearing was held in a "de novo" climate. The advisory trial committee report, the charge, the answer, and transcript of proceedings before the trial committee with briefs by the parties were reviewed by the Board of Governors without the presence of counsel on either side.

The Board of Governors had three alternatives: dismiss the charge, issue a private reprimand, or recommend public discipline to the Supreme Court of Kentucky. If the first two alternatives had been exercised, the case would have terminated without any detriment to the petitioner and the Board's sole function as a "screening device" would have been utilized. The vital elements of the due process hearing were fresh before the Board of Governors. The Board proceeded to *recommend* to the Supreme Court of Kentucky discipline in the form of two year suspension period. At that point, a possible point of detriment to petitioner, the court's rules provide for a review by the Court. Petitioner at that point, again, had an opportunity to file a response and brief in support thereof. Petitioner exercised that right. After the adverse opinion of the Supreme Court of Kentucky was rendered, petitioner exercised his right to file a petition for rehearing. In short, Kentucky's disciplinary proceedings are carefully drafted to assure all possible due process to an attorney under charge. At all crucial points in the proceeding notice and an opportunity to be heard are provided on numerous occasions after absolute notice of the allegations being made. *Never once has petitioner alleged that he was tried on facts of which he had no notice in either of the two* (2) *letters*

of notice or the disciplinary charge.

It is respectfully submitted that case law involving administrative proceedings in the executive branch of government with the right of review by the judicial branch are not applicable to original actions in the judicial branch by the court of highest jurisdiction in a state seeking to discipline officers of the court through proceedings instituted by the court through an administrative arm of the court: its unified bar association. Due process of law must be accorded to an attorney. This had been done without any doubt by Rule 3 of the Supreme Court of Kentucky.

The disciplinary proceedings of the Supreme Court of Kentucky are not unlike disciplinary proceedings before the United States Supreme Court as provided in Rule 8. It appears that where factual issues are raised, the Court may appoint a committee to make an inquiry into the matter and submit a report and recommendation to the Court. Stern and Gressman, *Supreme Court Practice*, 5th Edition (1978) at page 932.

Respondent will answer specific matters raised by petitioner regarding proceedings before the Board of Governors. The Board of Governors serves as a "screening device." A charge can be dismissed by the Board, however, no public discipline can be ordered so there is *no final* action taken by the Board in that respect. It would serve no useful purpose to permit either respondent or petitioner or both to appear before the Board in any manner other than by the entire record including all evidence produced at the due process hearing. There is no "hearing" before the Board. The proceedings before the Board are a valid exercise of the statutory (KRS 30.170) and inherent power of the Supreme Court of Kentucky (Rule 3).

When the Board recommends public discipline, a lawyer is given access and notice of the entire disciplinary file before the Board and has the opportunity to respond to the Board's decision and file a brief in support thereof before the court decides his case. There is no disparity between the factual findings of the Board and the court in this case.

Had the "Board" step of the proceeding been eliminated, the case would have gone to the Supreme Court of Kentucky for determination of factual matters and the degree of discipline to be ordered. Certainly this Court will not entertain the issue of whether or not the case should have been dismissed or the degree of public discipline to be given by the state court. The tests of *Willner v. Committee on Character*, 373 U.S. 96, 105 (1963); *Johnson v. Avery*, 393 U.S. 483; *Spevak v. Klein*, 385 U.S. 511; *Schware v. Board of Bar Examiners*, 353 U.S. 232, and *Konigsberg v. State Bar of California*, 353 U.S. 252, are sustained by Kentucky disciplinary rules. Petitioner had notice, in fact, answered as fully as he could before the Inquiry Tribunal, the trial committee and the court before final discipline was ordered. He was also heard before the court on a petition for rehearing.

B. The Fact that the Kentucky Bar Association Did Not provide Petitioner With an Actual Copy of the Complaint Filed Against Him in Giving Him Notice of all Allegations of Fact in the Complaint and Did Not Specify in a Later Charge of Unethical and Unprofessional Conduct Specific Sections of the Code of Professional Responsibility Violated by the Conduct Described in the Charge, Petitioner's Fundamental Right to Due Process of Law and Equal Protection of the Law Was Not Violated.

Petitioner states that SCR 3.160 requires the Director of the Kentucky Bar Association to tender actual copies of the complaint to a disciplinary respondent. This rule under any common sense reading does not so provide. The rule states

that the Director shall promptly *notify* the respondent of the complaint. Both letters of notice described in detail facts that the Association considered to give rise to unethical and unprofessional conduct. (Appendix to Petition, pp. 41-43). By Court rule petitioner had no right to the bar association's investigative file. SCR 3.300.

Petitioner answered the letters of notice by filing detailed responses. The charge of unethical and unprofessional conduct contains no provisions not previously stated in the two (2) letters of notice. Petitioner answered the charge. No allegations or no amended charges outside of the two (2) letters of notice and the only original charge were ever made by respondent. Petitioner never alleges surprise or secret charges were alleged against him nor that he was taken by surprise during any of the disciplinary proceedings. Petitioners, as a matter of fact, had complete advanced notice of all complaints and charges pursued by the bar association and defended himself against the complaint and charges at every turn. Procedural due process has been given to petitioner.

Disciplinary cases in the Commonwealth of Kentucky are civil in nature under state law. The Supreme Court of Kentucky in this case clearly cited its opinions so holding. (Appendix to Petition, p. 10). The Court has stated its test applied on determining guilt:

> SCR 3.330 states that "the burden of proof shall rest on the association in disciplinary proceedings and the facts must be proven by a preponderance of evidence," however, the test should be "beyond a reasonable doubt" because Kentucky in effect applies a criminal standard. Kentucky disciplinary proceedings have always been civil by nature as a matter of sound state law. *Commonwealth ex rel. Buckingham v. Ward,* Ky., 267 Ky. 677 (1937). This Court has never reversed a state court disciplinary action because it was a civil proceeding. The issue is really moot in Kentucky since the Supreme Court of Kentucky has held that it is probable each justice applies the "beyond reasonable doubt test" anyway. ***Kentucky Bar Association v. Franklin,* 534 S.W. 2d 459 at 463 (1976).**

By virtue of SCR 3.130 the Supreme Court of Kentucky on November 11, 1969 became the first state to adopt the Code of Professional Conduct of the American Bar Association as a sound standard of conduct required of lawyers and that charges can be preferred where those standards are not met *and for other conduct calculated to bring the bench and bar of Kentucky into disrepute.* With respect to the latter phrase, the Supreme Court of Kentucky has stated that this standard is neither vague nor ambiguous as a matter of state law. *Nicholson v. Judicial Retirement and Removal Commission,* 562 S.W. 2d 306, Part I (Ky. 1978); Appendix to Petition, pp. 9, Fn. 7.

Being a civil action there is no requirement that the bar specified in the complaint or charge the specific rule of the Code of Professional Responsibility which have been violated by a disciplinary respondent under the facts stated in the charge. The rules of court do not require such a construction of a charge. During the course of the disciplinary proceeding the facts of the case were argued in briefs with specific Code provisions being argued. The decision of the Board of Governors and suspension opinion of the Supreme Court clearly cited the provisions of the Code and SCR 3.130 that had been violated by petitioner.

With respect to the cashing of the $105,000. check by petitioner, such conduct was in direct contravention of DR 1-102 (A) (4) providing:

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty

The Board's decision, as adopted by the Court, states, "No amount of check manipulating by the respondent as went on in this case can be justified under the circumstances which are evident when the entire facts are documented." (Appendix to Petition, p. 8).

When respondent borrowed money for his client Donoghoe from Norman Bodenbender, petitioner misrepresented the purpose of the loan as disclosed in his deposition in the *Citizens Case* at page 45 where petitioner stated:

> "Rather than telling Norman I was bailing out a lawyer that had gone bad, because I didn't feel like I should reveal the nature of my relationship with this man because I had learned it within the attorney-client privilege, I told him I was in a real estate deal and it would take about 30 days, and he scratched his head and said, 'Can you pay me 9 per cent interest' and I said, 'I'll be glad to' and he said, 'Okay, Come and get it.' "

The Court said this in its suspension opinion: "In lawyer's language this is a misrepresentation. In layman's language this is a lie." (Appendix to Petition, p. 4). The Code of Professional Responsibility provides that a lawyer shall not engage in conduct involving deceit or misrepresentation. DR 1-102.

Petitioner knowingly commingled the funds of his client Donoghoe with his own in violation of DR 9-102 (A) stating in part:

> DR 9-102 Preserving Identity of Funds and Property of Client.
>
> (A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank account maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein

> except as follows:
>
> (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

We know of no exception to the foregoing mandatory rule that permits a lawyer to commingle the funds of a client with the client's knowledge and consent. The rule states a lawyer "shall" and there are no exceptions.

The Board of Governors and the Court also found that petitioner violated Canon 9 of the Code of Professional Responsibility which provides that a lawyer shall avoid even the appearance of professional impropriety. The Court stated, "It is the view of the majority of the members of this court that Heavrin was more interested in protecting his interests than that of his client and that he knew at all times what he was doing." (Appendix to Petition, p. 10). Needless to say, petitioner's conduct brought the bench and bar of Kentucky into disrepute.

The aforesaid provisions of the Code of Professional Responsibility were known to petitioner, or should have been. The concepts of honesty and fair dealing are old concepts. SCR 3.130 demanded that he have this knowledge. The standards are clear and so are the facts in this case. The standards are objective and the penalty for violating the standards means public discipline. Petitioner is guilty of serious wrongdoing.

III.

THE DECISION BELOW IS CORRECT AND THERE ARE NO JUSTICIABLE REASONS FOR GRANTING THE WRIT

The Per Curiam Opinion of the majority of the Justices of the Supreme Court of Kentucky is based soundly on facts in the record of pleadings, briefs and evidence before it. The court and the Board of Governors supported by the court considered all defenses offered by petitioner and clearly stated so. The court found no mitigating circumstances in the record in its sound discretion. A fair reading of the entire record supports the entire opinion of the court. The opinion clearly cites the evidence it found in the record to support its findings. The court applied a clear standard to the facts and its grave effect on the image of the bench and bar.

This Court has made clear the strong state interest of state courts in disciplining its members in the recent case of *Goldfarb v. Virginia State Bar, et al.*, 95 S. Ct. 2004 (1975) at p. 2016 when it stated:

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' United States v. Oregon State Medical Society, 343 U.S. 326, 336, 72 S. Ct. 690, 697, 96 L.Ed. 978 (1952), see also Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 611-613, 55 S. Ct. 570, 571-572, 79 L.Ed. 1086 (1935). The interest of the States in reg ulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'. See Sperry v. Florida, 373 U.S. 379, 383, 83

> S. Ct. 1322, 1325, 10 L.Ed. 2d 428 (1963); Cohen v. Hurley, 366 U.S. 117, 123-124, 81 S. Ct. 954, 958, 6 L.Ed. 2d 156 (1962); Law Students Research Council v. Wadmand, 401 U.S. 154, 157, 91 S. Ct. 720, 723, 27 L.Ed. 2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no diminution of the authority of the State to regulate its professions."

Petitioner seeks to relitigate his case on factual issues before this Court. If the Supreme Court of Kentucky gave little significance to the petitioner's evidence, it was due to the lack of credibility of evidence and not due to an oversight on the part of the court. Here again, petitioner has urged as a reason for granting Certiorari an issue which is not valid. The factual determination by the lower court and the weight and credibility accorded to the evidence are not properly reviewable especially where the court, directly in its opinion, reviewed the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for Writ of Certiorari be denied.

Respectfully submitted

LESLIE G. WHITMER
Director-Counsel
Kentucky Bar Association
403 Wapping Street
Frankfort, Kentucky 40601
Counsel for Respondent

APPENDIX

KENTUCKY BAR ASSOCIATION

June 10, 1976

CONFIDENTIAL

Donald M. Heavrin, Esquire
914 Republic Building
Louisville, Kentucky 40209

Dear Mr. Heavrin:

An investigation by authority of this office has caused the following allegations to be made by this office, and you should regard them as a formal complaint issued against you.

In 1972 and thereafter, you represented James F. Donoghoe, Jr., in regard to various matters including a criminal charge in Jefferson County Court of uttering a worthless instrument for $3,000, and in negotiations with two of Mr. Donoghoe's clients from Pennsylvania who were making certain demands in regard to settlement money in a civil action. In order to assist your client, you loaned Mr. Donoghoe certain funds to partially or fully pay monies owed to Donoghoe's clients. In order to make such a loan, you misrepresented to Norman Bodenbender of Trustcon, Inc., Greenville, Indiana, that you desired to borrow some $45,000 for a real estate deal on a short term basis. Mr. Bodenberger subsequently loaned you $32,500. In order to secure yourself in your subsequent loan to Mr. Donoghoe, you accepted a bill of sale from Mr. Donoghoe for jewelry valued between $100,000 to $200,000 wherein Mr. Donoghoe agreed to sell the jewelry to you for $44,000 with an option to repurchase in 30 days. With the $32,500 loan you paid $10,000 to Fidelity Finance Corporation to pay off a loan owed by Mr. Donoghoe and thereby released the said jewelry which was being held as collateral. The remainder of the loan was then used to try and placate Mr. Donoghoe's clients and keep them from filing complaints with the Kentucky Bar Association and proceeding with prosecution against Mr. Donoghoe. As more funds were needed, you borrowed an additional $10,000 from your father.

In June of 1972, Mr. Donoghoe settled a personal injury action and received a check dated June 6, 1972, for $105,000 from Lord, Bissell, & Brock of Chicago, Illinois. After unsuccessfully trying to assist Mr. Donoghoe in cashing the said check at Liberty National Bank, you thereafter falsely told Mrs. Maureen Collie, an employee of Citizens Fidelity Bank & Trust Company, that you personally knew the said check had been endorsed by each listed payee.

At another point during your representation of Mr. Donoghoe, he tendered to you a check in the amount of $36,000 as a partial payment on the $42,500 borrowed by you for him. After you deposited the check, you were informed by Mr. Donoghoe that he had insufficient funds to cover it. Thereupon, you issued a check to Mr. Donoghoe for $36,000 in order to disguise your client's conduct and while you were cognizant of insufficient funds in your own bank account to cover your check. Both checks were returned for insufficient funds.

Pursuant to the provisions of RAP (formerly RCA) 3.160, you have fifteen (15) days from the date of this letter to respond to the complaint. This matter will be treated in accordance wih RAP 3.170 et sequi.

You should make no contacts or communications with the Inquiry Tribunal, House of Delegates, Board of Governors, Supreme Court of Kentucky, or any member thereof. Please observe the provisions of RAP 3.150 and 3.290 with respect to the foregoing communications or contacts.

Please file your response in triplicate within the stated time to expedite the necessary procedures. If you have any questions concerning the matter, please contact us.

Sincerely,
Leslie G. Whitmer
Director

LGW/sp
Enclosure
CERTIFIED MAIL

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - Complainant

VS. **TRIAL COMMITTEE DISSENTING OPINION**

DONALD M. HEAVRIN - - Respondent

The majority of the trial committee has recommended to the Board of Governors that the respondent's motion to dismiss be granted. Respondent's position and apparently that of the majority is that his right to due process has been violated and therefore all charges should be dismissed, evidently with prejudice. For the reasons set forth hereafter, I respectfully dissent from that opinion.

The heart of the controversy is centered in RAP 3.160, in particular paragraph (a) which states:

> "Any complaint against an attorney for unprofessional conduct shall be filed with the director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge receipt of the complaint or respond to the merits."

Neither the respondent nor the trial committee assert the rule is in itself violative of due process. They do assert that the Bar failed to follow the rule, or at least their intrepretation of the rule, and in so doing failed to give the respondent his due process rights.

All the rule requires is that the respondent be notified of the complaint and given notice that he has 15 days in which to respond. It does not require the actual complaint, complete

with the names of all sources of information be forwarded. Would the majority hold that if the original information had been received by telephone, respondent must be given a tape of that conversation or at least a transcript thereof? I think not. Would the majority interpret the rule as requiring the Bar to abstain from investigating unethical conduct until a signed, written complaint has been filed? I hope not. To require this reads more into the rule than is there or was intended to be there, yet, that is precisely their position. Admittedly the rule, as with most writing efforts of man, could be more succinct, but at present it is sufficiently clear to refute the position taken by the respondent and adopted by the majority.

"Due process of law" means that no citizen shall be deprived of his life, liberty or property without reasonable notice and opportunity to be heard according to regular and established rules of procedure. The fundamental requirement is the opportunity to be heard. It is obvious that respondent was given this opportunity. It is also obvious that he was given adequate notice.

There is no claim that the Commonwealth's Attorney is or was a witness to the events which constitute the basis for the charges. Of course had he been, then there would have been the right to confront him *at the trial committee hearing.*

It is only where the name of the complainant is necessary for an adequate response to the merits that due process would require the name to be divulged. That is not the case here.

A few final comments regarding procedure. The trial committee unanimously requested the parties to brief the issue discussed above. We perhaps exceeded our authority in so doing since RAP 3.280 seemingly restricts preliminary motions. Nevertheless, the committee did so in order to give the

respondent ample opportunity to present every issue he felt important to his defense. I do disagree, however, in that by deciding the preliminary motion the trial committee is relieved from complying with RAP 3.360. The committee should have made the determinations required by the rule and presented its advisory report on the substantive issues as well as the preliminary motion. I do not, however, think that one member of the committee can or should file a report on the substantive issues, therefore this dissenting opinion does not express my position on the substantive issues.

MINORITY FINDINGS

It is the findings of the minority that:

1. (a) The complaint involved resulted from the investigation of the Bar; and

(b) Did not result from the information received from the Commonwealth's Attorney.

2. RAP 3.160 requires:

(a) Notice that a complaint has been made; and

(b) The opportunity for a response.

3. RAP 3.160 does not require:

(a) An absence of action on the Bar's behalf until a signed, written complaint is received;

(b) A copy of the "complaint" be given respondent.

4. The procedure used in the instant case comported with RAP 3.160 and did not deny due process of law to the respondent.

5. While the trial committee may hear evidence or matters raised by motions to dismiss, it has no authority to treat as dispositive, its recommendation on preliminary motions other than those set out in RAP 3.280.

6. The trial committee failed to comply with RAP 3.360 by not filing a report dealing with the substantive issues.

RECOMMENDATAIONS

1. That the majority opinion not be accepted.

2. That the trial committee be directed to file a report in compliance with RAP 3.360. That report may still include a recommendation to dismiss for procedural defects.

Victor Fox

MINUTES AND CERTIFICATION OF PROCEEDING BY BOARD OF GOVERNORS KENTUCKY BAR ASSOCIATION

IN RE: DONALD HEAVRIN

I, Frank E. Haddad, Jr., President, do certify:

This cause came on for consideration by the Board of Governors of the Kentucky Bar Association, 11 members entitled to vote on disciplinary matters being present, and all other persons and staff absent from the room. Richard D.D Remmers, Louisville, having disqualified himself in participating in this matter, and being absent from the room, pursuant to SCR 3.370 Chief Justice John S. Palmore appointed Robert G. Stallings, Louisville, as a special Board member to consider and act in this case.

The record of the case was physically present. On motion made and seconded, the report of the Trial Committee was received. The case was discussed, the discussion being confined to the record.

After full consideration, a roll call vote was taken on the issue of guilt or innocence. The result:

Guilty—10

Not Guilty—1

Abstaining—0

After discussion was held on the appropriate punishment, a roll call vote was held with a majority of 10 recommending to the Supreme Court of Kentucky that the respondent be suspended for two years and required to pay the costs

in this action.

Other recommended punishment was one for a private reprimand.

Pursuant to SCR 3.370, a written decision of the Board was ordered to be filed with the Director.

This certificate and minutes of proceeding, after being inspected by each member voting, are made a part of the record in this case and the minutes of the Association.

This 18th day of March, 1978.

FRANK E. HADDAD, JR., President

ATTEST:

LESLIE G. WHITMER, Director

CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for the Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of April, 1979, I served on the Honorable Henry A. Triplett, Third Floor, 231 South Fifth Street, Louisville, Kentucky 40202, Attorney for Petitioner, a copy of this brief by mailing same, postage prepaid.

Leslie G. Whitmer

LESLIE G. WHITMER

Supreme Court, U. S.
FILED
MAR 1 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1497

DONALD M. HEAVRIN - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

BRIEF OF AMICUS CURIAE, JEFFERSON COUNTY BAR ASSOCIATION, INC. IN SUPPORT OF THE PETITIONER, DONALD M. HEAVRIN'S, PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1497

DONALD M. HEAVRIN - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION - - *Respondent*

BRIEF OF AMICUS CURIAE, JEFFERSON COUNTY BAR ASSOCIATION, INC. IN SUPPORT OF THE PETITIONER, DONALD M. HEAVRIN'S, PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The parties, Donald M. Heavrin, petitioner, and the Kentucky Bar Association, respondent, have each consented to the Jefferson County Bar Association, Inc. filing a brief amicus curiae in support of petitioner's petition for writ of certiorari to the Supreme Court of Kentucky. (Appendix 13).

The Jefferson County Bar Association, Inc., hereafter designated the "Jefferson County Bar," is a nonprofit Kentucky corporation whose members are duly licensed to practice law in the Commonwealth of Kentucky and regularly practice law in Jefferson County, Kentucky, the county wherein the petitioner is alleged to have committed the acts which led to his suspension and these proceedings in this Honorable Court.

By resolution the board of directors of the Jefferson County Bar resolved to file an amicus curiae brief in support of petitioner's petition for writ of certiorari.

Amicus curiae believes this may be one of the most important cases ever presented to this Court relative to the disciplinary process for lawyers and after reviewing the record, the opinion of the Supreme Court of Kentucky, and the petition for writ of certiorari filed by petitioner we submit there is a clear showing that petitioner was denied due process of law and equal protection of the law.

At the outset the Jefferson County Bar should say that it does not support lawyers who fail to adhere to acceptable standards of conduct and lawyers who violate acceptable standards of conduct should be judged according to their actions and the law and this brief should not be construed as taking a contrary position.

The Jefferson County Bar is disturbed about the lack of due process of law and the lack of equal protection of the law as shown by the record of this case.

First, the Jefferson County Bar is concerned that the Kentucky Bar Association would take the position that it was not required to give petitioner a copy of the original complaint filed against him. (Petitioner's appendix, page 48, "IT HAS BEEN THE UNWAIVERING POSITION OF COMPLAINANT THAT RESPONDENT HAS ABSOLUTELY NO RIGHT WHATSOEVER TO A COPY OF THE ACTUAL COMPLAINT UNDER THE RULES OF THE SUPREME COURT OF KENTUCKY OR THE DUE PROCESS CLAUSE OF THE FEDERAL AND STATE CONSTITUTIONS."). This statement was made by the Kentucky Bar Association notwithstanding the rule in effect at the time the complaint was made; (former RCA 3.160, Initiation of Disciplinary Cases, Petitioner's Appendix, page 48, "Any complaint against an attorney for unprofessional conduct shall be filed with the director who shall promptly notify the attorney by certified mail of the complaint and inform him that he has fifteen days to acknowledge *receipt* of the *complaint* or respond to the merits.") If a lawyer is charged with a violation of disciplinary rules but cannot see a copy of the complaint or charging documents, he cannot acknowledge receipt of same nor respond to the merits. Despite the fact that dozens of pages were written on both sides of this issue the Kentucky Supreme Court did not face the issue but ignored it. In reviewing the record of this case the Jefferson County Bar wonders who filed the complaint, who initially suggested the petitioner violated acceptable standards of conduct governing the practice of law, what the violations were, and who was injured.

The facts related in *Kentucky Bar Association* v. *Heavrin,* Ky., 573 S. W. 2d 916, concern Heavrin's dealings with Donoghoe, the payee's of certain checks and the borrowing of funds from Bodenbender. Even though Heavrin was found not guilty of making a misrepresentation to Bodenbender the majority of the Kentucky Supreme Court refers to that transaction as if Heavrin had done something wrong, but a review of the record indicates there was no misrepresentation and Bodenbender was completely satisfied in all aspects of his relationship with Heavrin and he was not a complainant.

The payees of certain checks (whom Heavrin allegedly did not protect) were represented by competent counsel and they did not institute litigation against Heavrin or file a complaint with the Kentucky Bar Association, yet the majority of the Kentucky Supreme Court appears to consider Heavrin's relationship to the check as a type of check manipulation with consequential financial loss to the payees.

Donoghoe, a lawyer who was subsequently disbarred, employed Heavrin to represent him, was satisfied with Heavrin's professional work, instituted no litigation against him and filed no complaint with the Kentucky Bar Association.

In reviewing matters concerning Bodenbender, the payees of the check and Donoghoe, none of them have accused Heavrin of any wrongdoing or violation of any acceptable standards of conduct governing the practice of law. This causes the Jefferson County Bar to wonder who, if anyone filed a complaint against Heavrin.

In *Kentucky Bar Association* v. *Heavrin, supra,* there is a question of misrepresentation by Heavrin to employees of the Citizens Fidelity Bank and Trust Company. These matters were the subject of litigation in Jefferson Circuit Court and that court absolved Heavrin of any wrongdoing. The same result was reached by the trial committee of the Kentucky Bar Association who examined the record of the Circuit Court litigation and heard additional witnesses. Yet the Board of Governors of the Kentucky Bar Association without hearing any witnesses reached a decision contradictory to the Trial Committee of the Kentucky

Bar Association and the Jefferson Circuit Court. The Jefferson County Bar wonders why fact finding bodies are established if a Board of Governors who hears no witnesses can discard their findings of fact and opinions without comment.

The next point that disturbs the Jefferson County Bar is the fact that apparently when formal charges were lodged against Heavrin they did not indicate which particular section of the Code of Professional Responsibility Heavrin was claimed to have violated but were identified after the trial. (Petitioner's Appendix page 21). Surely a person, whether he is a lawyer or not, has the right to know the precise matters with which he is charged before the trial starts so that he can prepare a proper defense and not be prejudiced by a modification of the charges. It is easy to make charges, especially when no particular violation of the Code of Professional Responsibility is cited and the accused is not given a copy of the complaint, but it is most difficult to defend against such action and, that is what appears to have happened in this case.

A close reading of *Kentucky Bar Association* v. *Heavrin, supra,* indicates the Board of Governors and the majority of the Court found Heavrin violated Canon 9 of the Code of Ethics and DR 1-102(A)(4) and DR 9-102(A) of the Code of Professional Responsibility.

The Jefferson County Bar suggests that Canon 9 and DR 1-102 contains language which is so broad that no person, even a lawyer, can understand its proscription and the language is so subjective that it would not

pass the muster of stating a claim in a civil action or a criminal offense via a warrant or indictment. This contention is so eloquently covered in Chief Justice Palmore's dissent (Petitioner's Appendix pages 22, 23, 24) that amicus curiae sets forth this portion of the dissent in full:

> DR 9-102(A) condemns the mingling of a lawyer's funds with those of his client. No one has cited any authority for the proposition that it cannot be done with the knowledge and consent of the client. The client in this instance was Donoghoe. Everything that was done was with his knowledge and for his convenience and, to the extent that any "commingling" occurred, it was done in his very presence and under his supervision. But even if that were not a sufficient answer to the charge of commingling, there was no real commingling here anyway. $49,000 was put into one of Heavrin's accounts so that he could give Donoghoe a check instead of cash. The other $45,000 was put in his office account so that he would write a check to his escrow account in another bank and then distribute the money as directed by his client, which he did. Except for the insignificant $42 mentioned earlier in this opinion, the deposit and transfer of these funds were completed almost contemporaneously. None of the money remained in either of Heavrin's private accounts long enough to get warm, much less to find a new home. I cannot believe the members of the Board thought this through.
>
> The last references by the Board to specific rule violations are that Heavrin's conduct "constituted a reckless disregard for the rights of the payees on the checks [sic] in question and is a violation not

only of Canon 9 of the Code of Ethics in regard to Trust Funds, but also DR 1-102."

Both Canon 9 and DR-1-102 cover a good deal of territory. Canon 9 says, "A lawyer Should Avoid Even the Appearance of Professional Impropriety." The Ethical Considerations and Disciplinary Rules following Canon 9 all provide specific applications of that broad precept. Except for the matter of commingling funds, which I have already discussed, none of them comes close to this case. DR 1-102 declares it misconduct to (1) violate a Disciplinary Rule, (2) circumvent a Disciplinary Rule, (3) engage in illegal conduct involving moral turpitude, (4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, (5) engage in conduct that is prejudicial to the administration of justice, or (6) engage in any other conduct that adversely reflects on his fitness to practice law. Thus far, I do not see that Heavrin violated or circumvented any of the Disciplinary Rules mentioned by the Board, and I do not believe anyone involved in this proceeding would claim that he engaged in illegal conduct. If he did, apparently the grand jury of Jefferson County never got word of it. Item (4), as I have suggested before, refers to intentional deceit. Item (5) pertains to the administration of justice and obviously can have no application to this case. Only Item (6), "conduct that adversely reflects on his fitness to practice law," could possibly be argued as appropriate to the charge that Heavrin disregarded the rights of the payees of the $105,000 check.

Some years ago, in Kentucky State Bar Association v. Taylor, Ky., 482 S. W. 2d 574, 582 (1972), we made the following observation: "If the canons

of ethics adopted for the legal profession were tested under the 'void for vagueness' doctrine which has spelled the doom or various breach of peace and disorderly conduct laws throughout the country it is doubtful that they would survive this case." I repeat that observation here. Although this is not a criminal case, and the principles of constitutional law applicable to criminal cases are not entirely applicable here, the right to engage in a professional practice, once earned, is a right of great value, and its loss by revocation or suspension is nearly as serious a punishment as a criminal conviction and sentence. Without attempting to research and write a law review article on the subject, I think the due process rights of a respondent in a disciplinary proceeding which may result in the loss or suspension of his license to practice can be no different from those of a defendant in a criminal case. In fact, the law under which he is being tried must be clear, and the charge must be specific. In this proceeding neither of those requirements has been satisfied.

"Conduct that adversely reflects on his fitness to practice law." But what standard? And more importantly, by whose standard? The answer is unavoidable—the subjective standard of whoever happens to be doing the judging. So far as I am concerned, that cannot be the law in a civilized society—not in this country, anyway.

Amicus believes as petitioner believes that the legal contentions here are governed by *In Re: Ruffalo,* 390 U. S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222 and the other cases cited in the Petition for Writ of Certiorari heretofore filed.

Amicus curiae would further observe that the legal profession is under heavy assault by the press and other persons dissatisfied with its performance and adherence to appropriate standards of conduct. Much of this may have sprung from Watergate and the Jefferson County Bar is the first to note that perhaps as a group, lawyers are too sensitive to just criticism. Amicus understands that the best forum for cleaning up the legal profession is the legal profession itself. Unfortunately, however, and coincidental to the assault and complaints, the legal profession itself tends to overreact. As in the case here and other cases, it appears that shortcuts are being taken so that the legal profession can proudly announce it has disciplined lawyer X for Y conduct. This is not an unusual syndrome and it happens in other areas. Courts, legal associations, bar associations, and lawyers, of all persons, should be more careful, however, not to be caught in the clamor and should retain objectivity and basic adherence to constitutional rights.

Many of the canons contained in the Code of Professional Responsibility are so vague as to be meaningless. For example, what does the term "avoid the appearance of impropriety" mean to the average lawyer or to anyone else. What does the term "circumvent a disciplinary rule" or "engage in conduct that is prejudicial to the administration of justice," or "engage in any other conduct that adversely reflects on his fitness to practice law" mean. The problem with these canons is, of course, that they mean different things to different people. To a teetotaler, it might mean that a lawyer

should never take a drink of an alcoholic beverage, or go to a nightclub. Any lawyer who has the temerity to defend a person charged with a crime may be deemed to have engaged in conduct prejudicial to the administration of justice particularly if he succeeds in securing the acquittal of a person who is actually guilty. What is illegal conduct involving moral turpitude? Is this the same as appearance of professional impropriety. What is conduct that adversely reflects on fitness to practice law. Would this include a gambling junket to a state where gambling is legal. Would this include a divorce. How about a conviction for drunk driving.

The point is that none of these broad or vague canons can precisely apprise an attorney of the precise misconduct of which he is charged. Any one of these canons on a given day and by a given group could result in discipline being imposed to the extent of disbarment.

Amicus curiae sincerely hopes this Court will review this case and deal with these hard questions. As long as the rules are objective and reasonably precise and the rules apply equally to all and there are some objective standards for punishment, then lawyers can have no complaint. If, however, these rules are subjective to the whim and caprice of the authority who passes judgment, then such authority has a blank check to do as they wish to any lawyer at any time. This will and has had a chilling effect on many lawyers who frequently espouse unpopular causes and seek no remuneration for it.

WHEREFORE, the Jefferson County Bar Association, amicus curiae, respectfully prays that Donald M. Heavrin's Petition for Writ of Certiorari to the Supreme Court of Kentucky be granted.

Respectfully submitted,

JOSEPH G. GLASS, *Counsel and President of Jefferson County Bar Association, Amicus Curiae*

ALLEN K. GAILOR, *Counsel and Secretary for Jefferson County Bar Association, Amicus Curiae*

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1497

DONALD M. HEAVRIN - - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION - - - *Respondent*

CONSENT OF PETITIONER, DONALD HEAVRIN, AND RESPONDENT, KENTUCKY BAR ASSOCIATION, FOR JEFFERSON COUNTY BAR ASSOCIATION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DONALD HEAVRIN'S PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF KENTUCKY

The petitioner, Donald M. Heavrin, by counsel, and the respondent, Kentucky Bar Association, by counsel, consent to Jefferson County Bar Association filing a brief amicus curiae in support of the petitioner's, Donald M. Heavrin's, Petition for Writ of Certiorari to the Supreme Court of Kentucky.

Donald M. Heavrin, Petitioner

By: (s) Henry A. Triplett
Kentucky Bar Association

By: (s) Leslie Whitmer

CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of April, 1979, three (3) copies of this brief of amicus curiae of the Jefferson County Bar Association, Inc. and accompanying separate Appendix were mailed, postage prepaid, to the Honorable Leslie G. Whitmer, Director, and Mr. Michael M. Hooper, Kentucky Bar Association, 403 Wapping Street, Frankfort, Kentucky 40601, on behalf of respondent and the Honorable Henry A. Triplett of the firm of Hogan, Taylor, Denzer and Bennett, 231 South Fifth Street, Louisville, Kentucky 40202, counsel for petitioner.

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Counsel and Secretary for the Jefferson County Bar Association, Inc.